



Preliminary submission to the Queensland Law Reform Commission Review of the Neighbourhood Disputes (Dividing Fences and Trees) Act 2011 (Qld)

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**Review of the *Neighbourhood Disputes
(Dividing Fences and Trees) Act 2011***

Discussion Paper

Queensland
Law Reform Commission

**Review of the *Neighbourhood Disputes
(Dividing Fences and Trees) Act 2011***

Discussion Paper

WP No 72
June 2015

SUBMISSIONS

You are invited to make submissions on the issues raised in this Discussion Paper. Submissions should be sent to:

Email: **lawreform.commission@justice.qld.gov.au**

Facsimile: (07) 3247 9045

The Secretary
Queensland Law Reform Commission
PO Box 13312
George Street Post Shop Qld 4003

An appointment to make an oral submission may be made by telephoning:
(07) 3247 4544

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Chapter 1

Introduction

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INTRODUCTION

1.1 Between 2007 and 2011, the Department of Justice and Attorney-General ('DJAG') conducted a review into 'neighbourly relations' ('the DJAG review').¹ The DJAG review found that dividing fences and nuisance caused by a neighbour's tree were two of the most common sources of conflict between neighbours and complaints to government departments and local governments.² As a consequence, it focused on finding more efficient ways of assisting neighbours to resolve their disputes.³

1.2 The result of the DJAG review was the introduction of new legislation⁴ — the *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Qld) ('the Act')⁵ — to provide effective dispute resolution options for neighbours to resolve issues about dividing fences and trees and to reduce neighbourly disputes.⁶

¹ The consultation processes included the distribution of discussion papers, electronic surveys, public forums and the development of a consultation draft of proposed legislation: see generally Explanatory Notes, *Neighbourhood Disputes Resolution Bill 2010* (Qld) 2, 9; Department of Justice and Attorney-General (Qld), 'Review of Neighbourly Relations: Dividing Fences' (Discussion Paper, May 2007); Department of Justice and Attorney-General (Qld), 'Review of Neighbourly Relations: Trees' (Discussion Paper, July 2008); Department of Justice and Attorney-General (Qld), 'Review of Neighbourly Relations: Resolving Neighbourhood Disputes' (Discussion Paper, July 2008); Deputy Premier and Attorney-General, Minister for Local Government and Special Minister of State, 'Neighbourhood Disputes Resolution Bill 2010: Results of Consultation Process' (November 2010) 1 at Department of Premier and Cabinet (Qld), *Cabinet documents* (6 August 2014) <<http://rti.cabinet.qld.gov.au/cabinet.aspx>>.

² Deputy Premier and Attorney-General, Minister for Local Government and Special Minister of State, 'Neighbourhood Disputes Resolution Bill 2010: Results of Consultation Process' (November 2010) 3 at Department of Premier and Cabinet (Qld), *Cabinet documents* (6 August 2014) <<http://rti.cabinet.qld.gov.au/cabinet.aspx>>. See also Attorney-General and Minister for Industrial Relations, 'New laws to clarify neighbourly rights over trees and fences' (Ministerial Media Statement, 25 November 2010).

³ Explanatory Notes, *Neighbourhood Disputes Resolution Bill 2010* (Qld) 1.

⁴ See *Neighbourhood Disputes Resolution Act 2011* (Qld) (Act as passed). In 2013, the name of the Act was changed to *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Qld): *Classification of Computer Games and Images and Other Legislation Amendment Act 2013* (Qld) ss 1, 2(2)(e), pt 7.

⁵ The full text of the Act is available at <<https://www.legislation.qld.gov.au/LEGISLTN/CURRENT/N/NeighDisputesDFTA11.pdf>>.

⁶ Explanatory Notes, *Neighbourhood Disputes Resolution Bill 2010* (Qld) 2.

1.3 The Act repealed the legislation which then governed dividing fences — the *Dividing Fences Act 1953* (Qld) — and replaced it with new and updated provisions aimed at clarifying the rights and responsibilities of adjoining owners in relation to dividing fences and modernising the legislation.⁷ It also introduced new provisions as to the responsibilities of a ‘tree-keeper’ in relation to neighbouring property, and to ‘provide a simple statutory remedy’, in State-wide legislation, for the resolution of neighbours’ disputes about trees.⁸

1.4 The Act contains a statutory review requirement. Section 97 of the Act imposes an obligation on the Minister — in this case, the Attorney-General and Minister for Justice — to ‘review the operation and effectiveness’ of the Act, and to commence the review within three years (that is, by 1 November 2014). The then Attorney-General referred the review to the Commission on 27 October 2014.

THE COMMISSION’S REVIEW

1.5 The terms of reference for the Commission’s review are set out in full in Appendix A.

1.6 The main purpose of the Commission’s review is to determine whether the objects of the Act remain valid and whether the Act is meeting its objects.

1.7 The objects of the Act are to:⁹

- provide rules about each neighbour’s responsibility for dividing fences and for trees so that neighbours are generally able to resolve issues about fences or trees without a dispute arising; and
- facilitate the resolution of any disputes about dividing fences or trees that do arise between neighbours.

1.8 The Commission’s review also examines a number of specific issues that the Attorney-General has included in the terms of reference, namely:

- whether the allocation of responsibilities, liabilities and rights under the Act promotes resolution by neighbours of issues relating to dividing fences and trees;
- whether dispute resolution processes under the Act are fair, just and effective;

⁷ See generally, Explanatory Notes, Neighbourhood Disputes Resolution Bill 2010 (Qld) 2–3, 11; Queensland, *Parliamentary Debates*, Legislative Assembly, 25 November 2010, 4372 (CR Dick, Attorney-General and Minister for Industrial Relations). The *Dividing Fences Act 1953* (Qld) was repealed by s 99 of the *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Qld) (Act as passed).

⁸ Queensland, *Parliamentary Debates*, Legislative Assembly, 25 November 2010, 4372 (CR Dick, Attorney-General and Minister for Industrial Relations); Explanatory Notes, Neighbourhood Disputes Resolution Bill 2010 (Qld) 2–5.

⁹ *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Qld) s 3.

- the simplicity and ease of use of the Act for members of the community, including the clarity of the legislative provisions;
- whether the Act provides QCAT with sufficient powers to resolve issues;
- the appropriateness of remedies and penalties provided in the Act, including for non-compliance with QCAT orders;
- the operation of the Act in relation to other Acts or laws;
- the operation and effect of section 66(3)(b)(ii) of the Act;¹⁰
- the operation and effect of section 57 of the Act;¹¹ and
- whether the scope of the Act should be expanded to cover retaining walls built on neighbouring properties' boundaries.

THE DISCUSSION PAPER

1.9 This Discussion Paper examines the provisions of the Act, and raises for consideration numerous issues relevant to the review.

1.10 Chapter 2 examines the provisions dealing with dividing fences in Chapter 2 of the Act.

1.11 Chapter 3 examines the provisions dealing with trees in Chapter 3 of the Act.

1.12 Chapter 4 considers the operation and effectiveness of dispute resolution processes under the Act.

1.13 The terms of reference require the Commission to address 'the simplicity and ease of use of the Act for members of the community, including clarity of the legislative provisions'. This Discussion Paper deals with the allocation of responsibilities, liabilities and rights under the Act, the powers of QCAT to make orders under the Act and the enforcement of QCAT orders. The Commission's view is that, once it has received and considered submissions on those matters, it will be in a position to address this term of reference.

¹⁰ Section 66 of the *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Qld) empowers QCAT to make orders it considers appropriate in relation to a tree that has caused, is causing, or is likely within the next 12 months to cause substantial, ongoing and unreasonable interference with a neighbour's use and enjoyment of their land, including an order to remedy, restrain or prevent such interference. Section 66(3) includes a limitation, however, in the case of interference that is an obstruction of sunlight or a view. In particular, s 66(3)(b)(ii) provides that QCAT may make an order regarding a view if the tree rises at least 2.5m above the ground and if the obstruction is a 'severe obstruction of a view, from a dwelling on the neighbour's land, that existed when the neighbour took possession of the land'.

¹¹ Section 57 of the *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Qld) enables a neighbour to give a written notice to a tree-keeper requesting that the tree-keeper cut and remove one or more branches of the tree-keeper's tree that overhang to a point over the neighbour's land at least 50cm from the common boundary and are 2.5m or less above the ground.

CALL FOR SUBMISSIONS

1.14 The Commission seeks submissions in relation to this review. Submissions may be in any format and may respond to some or all of the issues and questions raised in this Discussion Paper, or any other issue relevant to the terms of reference that is not the subject of a specific question. It would be helpful if reasons could be given when answering specific questions.

1.15 Details on how to make a submission are set out at the front of this Discussion Paper.

1.16 The closing date for submissions is **10 August 2015**.

TIMEFRAME FOR THE REVIEW

1.17 The terms of reference provide for the Commission's report for the review to be given to the Attorney-General by 1 November 2015.

Chapter 2

Dividing Fences

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INTRODUCTION

2.1 Chapter 2 of the *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Qld) ('the Act') deals with dividing fences.

2.2 This Chapter of the Discussion Paper gives a brief overview of the historical development of dividing fences legislation in Queensland. It also discusses the Department of Justice and Attorney-General ('DJAG') review which led to the enactment of the Act in 2011 and outlines some of the key changes made to the dividing fences legislation in response to that review. This Chapter also provides an overview of the key provisions of Chapter 2 of the Act. It also asks questions about the operation and effectiveness of those provisions and other matters relating to dividing fences arising under the terms of reference.

HISTORICAL DEVELOPMENT OF DIVIDING FENCES LEGISLATION IN QUEENSLAND

2.3 At common law, the general rule is that adjoining owners of land are under no obligation to construct or repair fences on the boundary between their land for the benefit of themselves or each other.¹

2.4 In Queensland, and in other Australian jurisdictions, dividing fences legislation gives owners of adjoining lands statutory rights to compel contribution towards the construction or repair of a boundary fence.²

2.5 The first dividing fences statute that applied in Queensland was an 1828 NSW Act called *An Act to regulate the dividing Fences of adjoining Lands* ('the 1828 NSW Act').³ That Act was passed when Queensland was still part of the colony of New South Wales, in response to the introduction of fencing requirements for certain landholdings, and the rapid expansion of the pastoral industry.⁴ It created a general right of a landowner, by way of serving a written notice, to claim equal contribution from the owner of adjoining land⁵ towards the construction or repair of a dividing fence between their land, where there was not already a sufficient dividing fence.⁶ The owner who gave the notice was permitted to cut

¹ *Hilton v Ankesson* (1872) 27 LT 519; *Jones v Price* [1965] 2 QB 618; *Noarlunga DC v Coventry* [1967] SASR 71. See also, LexisNexis, *Halsbury's Laws of Australia* (at 19 May 2010) 355 Real Property, 'Fencing Obligations' [355-14065]; BA Helmore, *The Law of Real Property in New South Wales* (Law Book, 2nd ed, 1966) 44. *Halsbury's Laws of Australia* also discusses the exceptions to the general rule: at [355-14065].

² *Common Boundaries Act 1981* (ACT) pt 2 div 2.1; *Dividing Fences Act 1991* (NSW) pts 2–3; *Fences Act 1972* (NT) s 6; *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Qld) ch 2; *Fences Act 1975* (SA) ss 9–12; *Boundary Fences Act 1908* (Tas) pts 2–3; *Fences Act 1968* (Vic) pts 1–2; *Dividing Fences Act 1961* (WA) pts 2–3. One commentator has noted that, subject to any fencing covenant or agreement between the owners of adjoining lands, the dividing fences legislation does not impose a positive duty to fence on owners: I Wallace, 'The Law of Dividing Fences' (1981) 19(7) *Law Society Journal* (NSW) 539, 541.

³ *An Act to regulate the dividing Fences of adjoining Lands 1828* (NSW), 9 Geo IV No 12.

⁴ New South Wales Law Reform Commission, *Community Law Reform Program: Dividing Fences*, Report No 59 (1988) [2.2].

⁵ Or a person legally possessed of the adjoining land: *An Act to regulate the dividing Fences of adjoining Lands 1828* (NSW) 9 Geo IV 12, s 1.

⁶ *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Qld) s 12(2).

timber for the fence from the land of the adjoining owner (if that owner had not made a contribution), and a monetary sum was recoverable only if there was insufficient timber for the fence.⁷ The Act also provided for the referral of disputes as to the sufficiency of a dividing fence to arbitration.⁸ The Crown was exempt from liability under the Act. However, if Crown land subsequently became alienated, and an owner of adjoining land had already constructed a fence, that owner could recover half of the value of the fence from the owner who had acquired the land from the Crown.⁹ This NSW statute formed the basis of legislation passed in the other Australian colonies.¹⁰

2.6 In 1861, the 1828 NSW Act was repealed in Queensland, and replaced by the *Fencing Act 1861* ('the 1861 Act').¹¹ Like its predecessor, the 1861 Act provided for the apportionment between adjoining owners of the cost of dividing fences. It provided that an owner could require an adjoining owner¹² to contribute equally to the cost of the construction or repair of a dividing fence, by serving a notice to fence or a notice to repair on the adjoining owner. If the adjoining owner failed to respond within three months, the owner was entitled to recover half of the cost of the construction or repair.¹³ The 1861 Act also made provision for the restoration of a dividing fence which was damaged or destroyed by accident, or by fire or falling trees caused by the neglect of one owner.¹⁴ Two or more justices had jurisdiction to adjudicate disputes about the construction and repair of dividing fences.¹⁵ The amount recoverable as a contribution was limited to the cost of a three rail fence in country areas and a four rail fence or paling fence in a town area.¹⁶ The Act did not affect any existing covenant, contract or agreement about fencing made between any landlord and tenant.¹⁷

2.7 The *Dividing Fences Act 1953* (Qld) ('the 1953 Act'), which repealed and replaced the 1861 Act, was introduced to modernise the law regulating dividing fences.¹⁸ The 1953 Act built on the general scheme of the 1861 Act, including some

⁷ *An Act to regulate the dividing Fences of adjoining Lands 1828* (NSW) 9 Geo IV 12, s 1.

⁸ *An Act to regulate the dividing Fences of adjoining Lands 1828* (NSW) 9 Geo IV 12, s 3.

⁹ *An Act to regulate the dividing Fences of adjoining Lands 1828* (NSW) 9 Geo IV 12, s 2.

¹⁰ See, eg, *Fencing Act 1861* (Qld); *Fencing Act 1865* (SA); *Boundary Fences Act 1853* (Tas); *Fences Statute 1865* (Vic); *An Act to Regulate the Fencing of Town and Suburban Allotments 1834* (WA) 4 Gul IV No 4.

¹¹ 25 Vic No 12. The Act was amended in 1897 to extend its application to take into account natural physical features of adjoining lands: *Fencing Act of 1861 Extension Act of 1897* (Qld), 61 Vic No 9.

¹² Or an occupier of the adjoining land: *Fencing Act 1861* (Qld) ss 3, 7.

¹³ *Fencing Act 1861* (Qld) ss 3, 5–6 (repealed). The owner taking the initiative to erect or repair the fence was entitled to proceed against the occupier of adjoining land, who, if not the owner of that land, could in turn recover from that owner: ss 3, 7.

¹⁴ *Fencing Act 1861* (Qld) s 6 (repealed).

¹⁵ *Fencing Act 1861* (Qld) ss 13–14 (repealed).

¹⁶ *Fencing Act 1861* (Qld) s 14 (repealed).

¹⁷ *Fencing Act 1861* (Qld) s 8 (repealed).

¹⁸ Queensland, *Parliamentary Debates*, Legislative Assembly, 26 August 1953, 152 (W Power, Attorney-General).

new and more detailed provisions. Like the 1861 Act, the 1953 Act provided that, subject to certain exceptions, the owners of adjoining lands not divided by a sufficient fence were liable to join in or contribute to the construction or repair of a dividing fence in equal proportions.¹⁹ Separate procedures and notice requirements applied for the construction or the repair of a dividing fence.²⁰ The Act also reduced the period of notice from three months to one month,²¹ and empowered the Magistrates Court or QCAT to make orders to resolve disputes between adjoining owners about the construction or repair of a dividing fence, including the type of fence to be constructed.²²

2.8 In addition, the 1953 Act included a number of machinery provisions, such as:

- a new mechanism for the sharing by adjoining owners of the expenses of employing a registered surveyor to define the common boundary where the exact location of the boundary was in question;²³
- more detailed provisions prescribing the contents and service of a notice to fence or repair;²⁴
- a provision giving power to enter adjoining land to the person engaged in constructing or repairing a fence under the Act;²⁵
- more detailed provisions relating to the procedure for the recovery of any moneys due in relation to the construction or repair of dividing fences;²⁶ and
- a provision governing the apportionment of contribution between an owner of land and any lessee of that land (subject to any existing fencing agreement between them).²⁷

THE DJAG REVIEW

2.9 As mentioned in Chapter 1, the DJAG review examined the law which applied to the construction and repair of dividing fences, as provided under the 1953 Act. At the time of the review, the 1953 Act had been in force for almost 60

¹⁹ *Dividing Fences Act 1953* (Qld) ss 7, 15 (repealed).

²⁰ *Dividing Fences Act 1953* (Qld) ss 8–9, 16 (repealed).

²¹ *Dividing Fences Act 1953* (Qld) ss 9, 16(2) (repealed).

²² *Dividing Fences Act 1953* (Qld) ss 9, 16(2A)(d), (3), 18 (repealed).

²³ *Dividing Fences Act 1953* (Qld) s 13 (repealed).

²⁴ *Dividing Fences Act 1953* (Qld) ss 8, 16, 23 (repealed).

²⁵ *Dividing Fences Act 1953* (Qld) s 22 (repealed).

²⁶ *Dividing Fences Act 1953* (Qld) ss 10, 14, 19 (repealed).

²⁷ *Dividing Fences Act 1953* (Qld) s 20 (repealed).

years. The DJAG review identified a number of areas of uncertainty for neighbours. Among other things, concerns were raised that:²⁸

- many landowners were unaware of the existence of the 1953 Act, leading to adverse consequences for neighbours who did not comply with the Act's notice requirements;
- some of the requirements of the 1953 Act were onerous, such as the requirement to include two written quotes for proposed fencing work when giving notice to an adjoining owner, and some were difficult for landowners to interpret, such as the process for determining the position of the common boundary line;
- the 1953 Act did not provide any guidance about what constitutes a 'sufficient fence', or who had ownership of a dividing fence;
- the 1953 Act did not expressly provide for the application of the provisions to local governments;
- it was unclear whether the provisions of the 1953 Act applied to bodies corporate or lot owners in relation to land under a community titles scheme;
- there was confusion about whether the Act applied to rural properties; and
- it was unclear whether the 1953 Act applied to 'retaining walls'.

2.10 The DJAG review found that the former *Dividing Fences Act 1953* (Qld) 'needed to be replaced with contemporary legislation in a modern drafting style'.²⁹

KEY REFORMS RESULTING FROM THE DJAG REVIEW

2.11 The *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Qld) repealed the 1953 Act, and replaced it with new provisions aimed at clarifying the rights and responsibilities of adjoining owners in relation to dividing fences and simplifying and modernising the legislation.³⁰ While the new Act retained and

²⁸ See generally, Department of Justice and Attorney-General (Qld), 'Review of Neighbourly Relations: Dividing Fences' (Discussion Paper, May 2007); Deputy Premier and Attorney-General, Minister for Local Government and Special Minister of State, 'Neighbourhood Disputes Resolution Bill 2010: Results of Consultation Process' (November 2010) at Department of Premier and Cabinet (Qld), *Cabinet documents* (6 August 2014) <<http://rti.cabinet.qld.gov.au/cabinet.aspx>>.

²⁹ Explanatory Notes, Neighbourhood Disputes Resolution Bill 2010 (Qld) 1–2. See also Deputy Premier and Attorney-General, Minister for Local Government and Special Minister of State, 'Neighbourhood Disputes Resolution Bill 2010' (November 2010) [1] at Department of Premier and Cabinet (Qld), *Cabinet documents* (25 January 2015) <<http://rti.cabinet.qld.gov.au/cabinet.aspx>>.

³⁰ See generally, Explanatory Notes, Neighbourhood Disputes Resolution Bill 2010 (Qld) 2–3, 11; Queensland, *Parliamentary Debates*, Legislative Assembly, 25 November 2010, 4372 (CR Dick, Attorney-General and Minister for Industrial Relations). The *Dividing Fences Act 1953* (Qld) was repealed by s 99 of the *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Qld) (Act as passed).

updated a substantial number of provisions from the 1953 Act, it also made a number of key changes to the legislative scheme. For example, the Act:³¹

- introduces a single notification procedure to be followed when a dividing fence is to be constructed or repaired, including a new pro-forma notice for use when seeking a contribution to fencing work;
- provides that one written quote, rather than two, is sufficient for a notice to contribute to fencing work;
- changes the meaning of 'fence' to include a hedge or similar vegetative barrier;
- introduces rules about what constitutes a 'sufficient fence', including a 'basic rule of height' for dividing fences on residential land;
- states the common law position that a dividing fence, to the extent it is on the common boundary, is owned by the adjoining owners equally;
- restricts owners from attaching something to a dividing fence that unreasonably and materially alters or damages the fence;
- provides that local governments, as owners of land, are exempt from the provisions to the extent that the land is used as a public park;
- provides that the Act does not affect a by-law about a dividing fence made under the *Body Corporate and Community Management Act 1997* (Qld), and that, for scheme land under that Act, the body corporate for the scheme is the owner of the land for the purposes of the dividing fences legislation;
- includes clearer rules about the application of the Act to agricultural and pastoral land;
- distinguishes between a 'foundation or support built solely for the support and maintenance of the fence', which is included within the definition of a 'fence', and a retaining wall, which is not; and
- clarifies that a 'retaining wall' is not a 'fence' for the purpose of the Act, but that the Queensland Civil and Administrative Tribunal ('QCAT') may order work for a retaining wall to be done if it is necessary to carry out fencing work.

CHAPTER 2 OF THE ACT: DIVIDING FENCES

2.12 Chapter 2 of the Act contains six parts.

³¹ See generally, *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Qld); Explanatory Notes, *Neighbourhood Disputes Resolution Bill 2010* (Qld).

2.13 Parts 1 and 2 deal with preliminary matters, including the application of the provisions of Chapter 2 and key definitions and concepts that apply under the Act in relation to dividing fences.

2.14 Part 3 sets out rules about the responsibilities of neighbours (adjoining owners) in relation to a dividing fence.

2.15 Parts 4 to 6 contain provisions to facilitate the resolution of issues and disputes between adjoining owners about dividing fences. Part 4 sets out a procedure to be followed when seeking a contribution to fencing work for a dividing fence. Parts 4 and 5 confer a broad jurisdiction on QCAT to deal with disputes about any matter arising under Chapter 2 of the Act that cannot otherwise be resolved. Part 6 provides a procedure for adjoining owners to follow if they do not agree on the position of the common boundary line.

PRELIMINARY MATTERS

Resolving dividing fence issues and the role of mediation

2.16 The Act expressly encourages adjoining owners to attempt to resolve dividing fence issues without a dispute arising.³² Owners may attempt to negotiate the resolution of a dividing fence issue informally, without the involvement of a third party. They also have the option of participating at any time in free mediation offered by the Dispute Resolution Branch of the Department of Justice and Attorney-General, as part of its mediation service for neighbourhood disputes, including disputes about dividing fences.

2.17 If an owner makes an application to QCAT for an order, the applicable QCAT procedures will apply.³³ As a matter of procedure, applications made under the Act about dividing fences disputes are, except in limited circumstances, referred by QCAT for mediation before the application is heard.³⁴ Mediation and other dispute resolution processes are discussed in Chapter 4 of this Discussion Paper.

The application of the Act generally

2.18 The provisions of Chapter 2 of the Act that impose liability to contribute to fencing work for a dividing fence apply to 'adjoining owners' of land. However, Chapter 2 of the Act does not apply to all land or owners of land. The Act creates some exemptions from the fencing obligations under the Act.

2.19 Generally, Chapter 2 of the Act applies to land that is:³⁵

³² *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Qld) ss 7(3), 30(1).

³³ QCAT's power to refer a dispute to mediation is conferred by the QCAT Act: *Queensland Civil and Administrative Tribunal Act 2009* (Qld) s 75.

³⁴ See also QCAT, *Practice Direction No 4 of 2011 – Arrangements for the mediation and determination of minor civil disputes*, 1 November 2011.

³⁵ *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Qld) s 8(1).

- recorded in the freehold land register;³⁶
- subject to a lease or licence under the *Land Act 1994* (Qld); or
- subject to an occupation permit or stock grazing permit under the *Forestry Act 1959* (Qld),³⁷ or to a stock grazing permit under the *Nature Conservation Act 1992* (Qld).³⁸

2.20 However, Chapter 2 of the Act does not apply to land that is:³⁹

- a stock route within the meaning of the *Land Protection (Pest and Stock Route Management) Act 2002* (Qld);⁴⁰
- South Bank public land within the meaning of the *South Bank Corporation Act 1989* (Qld);
- a State plantation forest (including a licence area in a State plantation forest);⁴¹ or
- land prescribed under a regulation.⁴²

2.21 Chapter 2 of the Act also does not apply to adjoining land consisting of two parcels of agricultural land.⁴³ Historically, agricultural land has been excluded from

³⁶ The freehold land register is maintained under the *Land Title Act 1994* (Qld). It records (amongst other particulars) details of every lot brought under the *Land Title Act 1994* (Qld), every interest registered in the register and all instruments registered in the register: *Land Title Act 1994* (Qld) s 28.

³⁷ See *Forestry Act 1959* (Qld) s 35, under which an occupation permit or a stock grazing permit may be granted over any land comprised in any State forest. An occupation permit allows the permit holder to occupy the land for a fixed term: s 35(1)(a). A stock grazing permit allows the permit holder to graze stock for a term generally of no more than 10 years, or if the relevant land is in an SEQFA forest reserve, for a term ending no later than 31 December 2024: s 35(1)(c). For the purposes of s 35 of the *Forestry Act 1959* (Qld), an 'SEQFA forest reserve' is a forest reserve under the *Nature Conservation Act 1992* (Qld) the dedication of which was in force immediately before the commencement of s 35(7) (on 18 November 2005): s 35(7).

³⁸ See generally, *Nature Conservation Act 1992* (Qld) s 34; *Nature Conservation (Administration) Regulation 2006* (Qld) s 10(c); *Nature Conservation (Protected Areas Management) Regulation 2006* (Qld) s 56. A stock grazing permit may be granted over a regional park or a special management area (controlled action) within a national park (where the permit is for a prescribed activity stated in the notice declaring the area as a special management area): s 50. The permit may be for a maximum term of 10 years: *Nature Conservation (Administration) Regulation 2006* (Qld) s 19.

³⁹ *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Qld) s 8(2).

⁴⁰ A stock route is a road or route ordinarily used for travelling stock or declared under a regulation to be a stock route: *Land Protection (Pest and Stock Route Management) Act 2002* (Qld) sch 3 (definition of 'stock route'). If, in order to protect or improve the stock route network in its area, a local government considers it necessary to build a stock-proof fence on the boundary of land (not including State-controlled land) adjoining the network, the local government can issue a landowner with a notice that requires the owner to construct a stock-proof fence on the boundary of the land: *Land Protection (Pest and Stock Route Management) Act 2002* (Qld) ch 3 pt 6. The landowner must build and maintain the stock-proof fence unless the owner has a reasonable excuse: s 151. Note also that ch 2 of the *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Qld) does not apply in relation to a declared pest fence: *Land Protection (Pest and Stock Route Management) Act 2002* (Qld) s 7.

⁴¹ An area of land that is a State forest may be declared by regulation to be a State plantation forest (although such a declaration does not affect the status of the land as a State forest): *Forestry Act 1959* (Qld) s 32A(1), (3).

⁴² To date, there have not been any regulations made under the Act.

the application of dividing fences legislation. Generally, when land is used solely for agriculture, it is not necessary to fence, as fencing reduces the amount of land available for farming.⁴⁴

2.22 To remove any doubt, Chapter 2 of the Act is expressly declared not to apply to unallocated State land.⁴⁵

2.23 An 'owner', of land, for Chapter 2 of the Act, is:⁴⁶

- if the land is a lot recorded in the freehold land register under the *Land Title Act 1994* (Qld) — the registered owner of the lot under that Act;
- if the land is subject to a lease or licence under the *Land Act 1994* (Qld) — the lessee or licensee under that Act;
- if the land is subject to an occupation permit or stock grazing permit under the *Forestry Act 1959* (Qld) or a stock grazing permit under the *Nature Conservation Act 1992* (Qld) — the grantee for the permit;
- if the land is scheme land under the *Body Corporate and Community Management Act 1997* (Qld) — the body corporate for the community titles scheme;⁴⁷
- if the land is a parcel of land the subject of a plan under the *Building Units and Group Titles Act 1980* (Qld) — the body corporate for the plan;⁴⁸ or

43 *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Qld) s 8(3). 'Agricultural land' is rural land of more than half a hectare used for cultivating crops on a commercial basis regardless of whether the land is also used for residential purposes: *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Qld) s 18(1). 'Rural land' is land that has been zoned as rural land or has been declared by the Valuer-General to be rural land: *Land Valuation Act 2010* (Qld) s 9.

44 Explanatory Notes, *Neighbourhood Disputes Resolution Bill 2010* (Qld) 12.

45 *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Qld) s 8(4). 'Unallocated State land' is land that is not freehold land or land contracted to be granted in fee simple by the State, a road, a reserve, a national park, a conservation park, a State forest, a timber reserve, or subject to a lease, licence or permit issued by or for the State (other than a permit to occupy under the *Land Act 1994* (Qld)): *Land Act 1994* (Qld) sch 6 (definition of 'unallocated State land'). If an existing fence of a property not owned by an applicant for a permit to occupy under the *Land Act 1994* (Qld) is to be used as a boundary fence for the permit, the owner of the fence and the applicant must enter into a written and signed agreement on conditions about the maintenance of the fence before the permit is issued: *Land Act 1994* (Qld) s 179.

Section 108(1) of the *Nature Conservation and Other Legislation Amendment Act (No. 2) 2013* (Qld) amended the *Land Act 1994* (Qld) to omit the definitions of 'conservation park', 'nature conservation area' and 'national park', and to insert new definitions of 'national park', 'nature conservation area' and 'regional park (general)'. The current definition of 'unallocated State land' under the *Land Act 1994* (Qld) refers to a 'national park', but not to a 'nature conservation area' (which includes a national park, regional park or forest reserve under the *Nature Conservation Act 1992* (Qld)) or a 'regional park (general)'.

46 *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Qld) s 14(1).

47 *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Qld) s 14(1)(e). The term 'scheme land' refers to land that is part of a 'community titles scheme' under the *Body Corporate and Community Management Act 1997* (Qld): s 10, sch 6 (definition of 'scheme land').

48 *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Qld) s 14(1)(f). A 'plan' is a building units plan or a group titles plan: *Building Units and Group Titles Act 1980* (Qld) s 7 (definition of 'plan').

- if the land is let or may be let — a person who is entitled to, or would be entitled to, the rents and profits of the land whether as a beneficial owner, trustee, mortgagee in possession or otherwise.

2.24 However, the definition of ‘owner’ contains some exclusions. If land is used as a public park and the registered owner of the land is a local government, the local government is not the owner for Chapter 2 of the Act.⁴⁹

2.25 In addition, if land is a State plantation forest and a plantation licensee or plantation sub-licensee holds an interest under the *Forestry Act 1959* (Qld) over the land, the licensee or sub-licensee is not the owner for Chapter 2 of the Act.⁵⁰

Liability of State and Local Governments to contribute to fencing work

Land controlled by the State

2.26 Where land is held by the State as freehold land, the State is subject to the fencing obligations under the Act.⁵¹ The remaining land controlled by the State⁵² is, unless otherwise provided under the Act, exempt from the fencing obligations under the Act.⁵³ A similar policy approach was applied under the repealed *Dividing Fences Act 1953* (Qld).⁵⁴ The general exemption of the State from liability to contribute to fencing work under the Act recognises the practical and financial implications for the State if the exemption did not exist.

2.27 There is some inconsistency in the application of the Act to land over which the State has granted a permit.⁵⁵ The Act applies where land is subject to an occupation or stock grazing permit under the *Forestry Act 1959* (Qld), or to a stock grazing permit under the *Nature Conservation Act 1992* (Qld). However, the Act does not apply to land over which other similar interests are granted, even where they may also be used for occupation or stock grazing purposes.⁵⁶

⁴⁹ *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Qld) s 14(2)(a).

⁵⁰ *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Qld) s 14(2)(b)–(c).

⁵¹ *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Qld) s 8(1)(a). See also Explanatory Notes, Neighbourhood Disputes Resolution Bill 2010 (Qld) 12.

⁵² Eg, a road or reserve held under the *Land Act 1994* (Qld), a national park, regional park or forest reserve held under the *Nature Conservation Act 1992* (Qld), a State forest, State plantation forest or timber reserve held under the *Forestry Act 1959* (Qld) and unallocated State land.

⁵³ Explanatory Notes, Neighbourhood Disputes Resolution Bill 2010 (Qld) 12.

⁵⁴ *Dividing Fences Act 1953* (Qld) ss 4–4A, 6 (definition of ‘owner’); Explanatory Notes, Neighbourhood Disputes Resolution Bill 2010 (Qld) 12.

⁵⁵ Legislation regarding land controlled by the State is currently under review. In 2014, the Department of Natural Resources and Mines released a discussion paper about how to reform the system of State landholding in Queensland: Department of Natural Resources and Mines, *Queensland State Land – Strengthening our Economic Future*, Discussion Paper (2014). As a result, any changes to that system may have an impact upon the interests that may be obtained over land controlled by the State in the future.

⁵⁶ For example, under s 177 of the *Land Act 1994* (Qld), a permit to occupy unallocated State land may be granted over a reserve or a road (including a stock route).

Local governments

2.28 Local governments are generally exempt from fencing obligations under Chapter 2 of the Act. Where land is held by a local government as freehold land, the fencing obligations apply. However, if a local government is the registered owner of land that is used as a public park, the local government is not an owner of the land for Chapter 2 of the Act and is not required to comply with the fencing obligations for that land.⁵⁷

State and local governments may enter into agreements to fence

2.29 Notwithstanding the restricted application of Chapter 2 of the Act, the Act does not prevent the State, a local government or another entity from entering into an agreement to contribute to fencing work with an adjoining owner of land.⁵⁸

2.30 A number of government departments have administrative policies about cost-sharing agreements for fencing. For example, the policy applied by the Queensland Parks and Wildlife Services (QPWS) states that:⁵⁹

[a]lthough QPWS is not required to contribute to boundary fencing in most instances, where a need exists QPWS will continue to work with neighbours to construct or improve boundary fencing on a case-by-case basis. Contribution to the construction or maintenance of a fence may be shared through meeting some of the cost or by providing materials or labour. Details of cost sharing arrangements will be addressed via the development of fencing agreements.

2-1 Is the present application of Chapter 2 of the Act, particularly as it relates to the liability of the State and local governments, adequate and appropriate? If not, what changes should be made?

Pool fencing

2.31 Parts 3 to 6 of Chapter 2 of the Act⁶⁰ do not apply to a dividing fence that forms part of a pool safety barrier of a 'regulated pool' within the meaning of the *Building Act 1975* (Qld).⁶¹

The *Nature Conservation Act 1992* (Qld) also enables additional permits (other than a stock grazing permit) to be granted over land protected by that Act. A previous use permit may be granted where land is dedicated as a national park and immediately beforehand was being used in a manner inconsistent with the park's management principles, for a term no longer than the unexpired term of the existing authority or otherwise no longer than three years: s 36. Further, a licence, permit or authority may be granted over land in a regional park: s 34(1)(a)(ii). Finally, where land is declared a forest reserve, the *Nature Conservation Act 1992* (Qld) requires that it be managed so as to allow for the continuation of any lawful existing use of the land, provided that it is ecologically sustainable and, if designated as a proposed protected area, consistent with the management principles for that class of protected area: s 70F.

⁵⁷ *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Qld) s 14(2)(a).

⁵⁸ *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Qld) s 10(2).

⁵⁹ Queensland Parks and Wildlife Services, *Information Sheet: Boundary Fencing* (2012) Department of National Parks, Recreation, Sport and Racing (28 May 2015) <<http://www.nprsr.qld.gov.au/policies/>>.

No effect on private agreements or particular laws

2.32 Chapter 2 of the Act does not affect any covenant or agreement, other than an agreement under that Chapter, made between adjoining owners about a dividing fence, before or after the commencement of the Act.⁶² This preserves the effect of any agreement made between adjoining owners about dividing fences, or an agreement about fencing (for example, a covenant in a residential development), other than an agreement made under Chapter 2 of the Act.⁶³

2.33 Chapter 2 also does not apply to any by-law under the *Body Corporate and Community Management Act 1997* (Qld) or the *Building Units and Group Titles Act 1980* (Qld) about a dividing fence.⁶⁴ Nor does Chapter 2 apply to any law about retaining walls or rights of support, including easements of support.⁶⁵

The meaning of ‘dividing fence’, ‘fence’ and ‘fencing work’

The definition of ‘dividing fence’

2.34 A ‘dividing fence’ is defined under section 12 of the Act as a fence on the common boundary of adjoining lands.⁶⁶ The definition also includes a fence separating the land of adjoining owners constructed on a line other than the common boundary if:⁶⁷

⁶⁰ Parts 3 to 6 of the *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Qld) deal with neighbours’ responsibilities in relation to a dividing fence, the process for obtaining contribution and resolving disputes, the process for dealing with unauthorised construction or demolition and the process if the common boundary is not agreed, respectively.

⁶¹ *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Qld) s 9; *Building Act 1975* (Qld) ch 8 pt 2A. Pool fences are regulated under the *Building Act 1975* (Qld) as they are required to be constructed and maintained in compliance with the prescribed pool safety standard for the pool: *Building Act 1975* (Qld) ch 8 pts 2–2A, s 232. The maximum penalty for non-compliance with the prescribed pool safety standard is 165 penalty units (\$18 785): s 232(1). The prescribed value of a penalty unit is \$113.85: *Penalties and Sentences Act 1992* (Qld) ss 5(1)(e), 5A(1); *Penalties and Sentences Regulation 2005* (Qld) s 2B. As from 1 July 2015, the prescribed value of a penalty unit will be \$117.80: *Penalties and Sentences Amendment Regulation (No. 1) 2015* (Qld) ss 2, 4.

⁶² *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Qld) s 10(1)(a). The covenant or agreement must be a legally binding covenant or agreement: *Stilgoe v Llowgarch* [2005] NSWSC 520. See also, I Wallace, ‘The Law of Dividing Fences’ (1981) 19(7) *Law Society Journal* (NSW) 539, 541, 543.

⁶³ See *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Qld) ss 31–32, which are discussed at [2.61]–[2.66] below.

⁶⁴ *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Qld) s 10(1)(b).

⁶⁵ *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Qld) s 10(1)(c). Retaining walls are discussed at [2.79]ff below.

⁶⁶ *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Qld) s 12(1). ‘Common boundary’, for ch 2 of the Act, in relation to adjoining land consisting of one or more parcels of land separated by a watercourse, lake or other natural or artificial feature insufficient to stop the passage of stock at all times, includes the bed and banks of the watercourse, lake or other feature separating the lands: sch (definition of ‘common boundary’).

⁶⁷ *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Qld) s 12(2).

- it is impracticable to build the fence entirely on the common boundary of the adjoining lands because of natural physical features;⁶⁸ or
- the adjoining land includes one or more parcels of pastoral land separated by a watercourse, lake or other natural or artificial feature insufficient to stop the passage of stock at all times.

2.35 The definition of ‘dividing fence’ is central to the operation of the legislative scheme for dividing fences. Reference is made to a ‘dividing fence’ in most of the provisions in Chapter 2. For example:

- Section 13 empowers QCAT to decide ‘in any case’ that a dividing fence is a sufficient dividing fence.⁶⁹
- Section 20(2) provides that, if carrying out fencing work includes construction or replacement of a sufficient dividing fence, the fence must be constructed or replaced on the common boundary other than to the extent it is impracticable to do so because of natural physical features.
- Section 33(2) empowers QCAT, if there is more than one fence on the boundary of adjoining land, to decide which fence is the dividing fence and order the removal of the other fence or fences. Section 33(3) empowers QCAT, if there is a fence other than a dividing fence on adjoining land, to order that the fence be removed if QCAT considers its removal is necessary to allow fencing work for a dividing fence.
- Section 35 empowers QCAT to make orders about fencing work for a dividing fence, including, under section 35(1)(a), about the line on which the fencing work is to be carried out, whether or not that line is on the common boundary of the adjoining land⁷⁰ and, under section 35(1)(g), that in the circumstances no dividing fence is required for all or part of the boundary of the adjoining lands.

2.36 The definition of ‘dividing fence’ in the Act takes into account that sometimes the natural physical features of the land make it impracticable to build a fence on the line of the common boundary. However, where adjoining owners have mistakenly built a fence not on the true boundary, it is not a ‘dividing fence’ as defined.

⁶⁸ *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Qld) s 12(2)(a). In *Drinan v Dawson* [2014] QCATA 168, [8], Thomas P observed that s 12(2)(a) of the Act is directed to particular situations where a fence cannot be built on the common boundary (for example, if there is a significant tree and the fence needs to be diverted around it).

⁶⁹ *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Qld) s 13(1)(c). Section 13(2) further provides that the existence of a fence, other than a dividing fence, on adjoining land must not be taken into account in deciding whether there is a sufficient dividing fence.

⁷⁰ The occupation of land on either side of a dividing fence, as a result of an agreement made under Chapter 2 of the Act, or an order that fencing work is to be carried on a line other than on the common boundary of adjoining lands, does not affect the title to or possession of the land: *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Qld) ss 29, 35(2).

The definition of ‘fence’

2.37 The term ‘fence’ is widely defined under the Act as a structure, ditch or embankment, hedge or similar vegetative barrier, enclosing or bounding land, whether or not continuous or extending along the entire boundary separating the land of adjoining owners.⁷¹ It includes any gate, watercourse and a foundation or support built solely for the support and maintenance of the fence. It excludes a retaining wall and a wall that is part of a house, garage or other building.⁷² As a result, these types of wall are not regulated by the Act, although, in some circumstances, QCAT has power to make an order about work for a retaining wall.⁷³

The definition of ‘fencing work’

2.38 ‘Fencing work’ is also widely defined under the Act.⁷⁴ It includes the design, construction, modification, replacement, removal, repair or maintenance of the whole or part of a dividing fence (including planting, replanting and maintaining a hedge or similar vegetative barrier as the dividing fence). It also includes other activities, which are necessary for fencing work, such as the surveying or preparation of land (including the trimming, lopping or removal of vegetation along or on either side of the common boundary) for any of those purposes, and obtaining any required approval for the fencing work involved.

2-2 Are the definitions of ‘dividing fence’, ‘fence’ and ‘fencing work’ clear and easy to apply in practice? Are there are changes that should be made to clarify or improve those definitions?

2-3 Does the Act adequately provide for the situation where a fence that is intended to serve the purpose of a dividing fence is not, or cannot, be built on the common boundary for a reason other than it is impracticable to do so because of the natural physical features of the land? Generally, how should such fences be dealt with under the Act?

The definition of ‘sufficient dividing fence’

2.39 One of the concerns identified by the DJAG review was that the 1953 Act required neighbours to contribute equally to the cost of a ‘sufficient fence’, without providing any guidance as to the meaning of that term.⁷⁵ To address those

⁷¹ *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Qld) s 11(1).

⁷² *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Qld) s 11(2).

⁷³ See *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Qld) s 35(1)(f), which is discussed at [2.79]ff below.

⁷⁴ *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Qld) s 16.

⁷⁵ *Dividing Fences Act 1953* (Qld) s 7.

concerns, the Act introduced a definition of 'sufficient dividing fence', which sets out rules about when a dividing fence constitutes a 'sufficient' dividing fence.⁷⁶

2.40 For adjoining land consisting of two parcels of 'residential land',⁷⁷ the dividing fence must be between 50cm and 1.8 metres in height and, subject to any restrictions on the use of a particular material arising from a requirement under a relevant local law, constructed substantially of wood, chain wire, metal panels, bricks, rendered cement, concrete blocks, hedge or other vegetative barrier or other material of which a dividing fence is ordinarily constructed.⁷⁸

2.41 The Explanatory Notes to the Neighbourhood Disputes Resolution Bill 2010 (Qld) state that:⁷⁹

The basic rules stated for a fence are not intended to imply that any dividing fence less than that standard is now insufficient. For example, there may be great contention between adjoining owners as to whether an existing fence is sufficient and whether it needs repair rather than replacement. In older more established suburbs, the usual fence may have been a short chain wire or picket fence. It is not intended by this legislation that the shorter fence should now be considered insufficient and needs to be replaced. If a fence is sufficient to divide and is serving this purpose well, it should be retained. In fact, the history of the fencing between the properties and in the surrounding area should be treated as a very good guide as to what is sufficient.

2.42 For adjoining land consisting of two parcels of 'pastoral land',⁸⁰ the definition provides that the dividing fence must be sufficient to restrain livestock of the type grazing on each of the parcels.⁸¹

2.43 The definition also provides that a dividing fence is a sufficient dividing fence if, in any case:⁸²

- the adjoining owners agree between themselves that the dividing fence is a sufficient dividing fence; or
- QCAT decides the dividing fence is a sufficient dividing fence.

⁷⁶ *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Qld) s 13(1). There is no requirement for a sufficient dividing fence between two parcels of agricultural land: s 8(3). 'Agricultural land' is defined as 'rural land of more than half a hectare used for cultivating crops on a commercial basis regardless of whether the land is also used for residential purposes: *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Qld) s 18(1).

⁷⁷ 'Residential land' is defined as 'land, other than agricultural land and pastoral land, used primarily for residential purposes': *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Qld) s 18(4).

⁷⁸ *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Qld) s 13(1)(a), (3).

⁷⁹ Explanatory Notes, *Neighbourhood Disputes Resolution Bill 2010* (Qld) 15.

⁸⁰ 'Pastoral land' is defined as 'rural land of more than half a hectare used for grazing stock on a commercial basis regardless of whether the land is also used for residential purposes': *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Qld) s 18(2).

⁸¹ *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Qld) s 13(1)b).

⁸² *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Qld) s 13(1)(c).

2.44 When QCAT decides an application about whether a dividing fence is a sufficient dividing fence, it may consider all the circumstances of the application, including any existing or previously existing dividing fence, the purposes for which the adjoining parcels of land are used or intended to be reasonably used, the kind of dividing fence normally used in the area, whether the dividing fence is capable of being maintained by the adjoining owners, any policy adopted, or local law made, in relation to dividing fences by the local government for the area and any requirement for fencing work in a development approval for the land of either adjoining owner.⁸³

2.45 There is no provision in the Act that states that adjoining owners, when determining whether a dividing fence is a 'sufficient' dividing fence, may have regard to the same non-exhaustive list of factors. The inclusion of such a provision might assist owners in their negotiations with each other about the type of fence required and their contributions to it.

2.46 The definition of a 'sufficient dividing fence' also provides that the existence of a fence, other than a dividing fence, on adjoining land must not be taken into account in deciding whether there is a sufficient dividing fence.⁸⁴ This is intended to deal with the situation where an adjoining owner has built a fence within their own boundary in order to have the kind of fence that owner desires, and its presence creates practical difficulties, for example, with the construction or maintenance of a dividing fence on the common boundary.⁸⁵ In this situation, QCAT may also order the fence to be removed, if it considers its removal is necessary to allow a dividing fence to be constructed or repaired.⁸⁶

- | | |
|-----|---|
| 2-4 | Does the definition of 'sufficient dividing fence' in the Act provide adequately for the minimum standard required for a sufficient dividing fence in the context of urban and rural land? Are there any changes that should be made to the definition? |
| 2-5 | Should the Act be amended to provide that adjoining owners, when considering whether a dividing fence is a 'sufficient dividing fence', may have regard to the same non-exhaustive list of factors that QCAT may consider when deciding whether a dividing fence is a 'sufficient dividing fence'? |

NEIGHBOURS' RESPONSIBILITIES

2.47 Part 3 of Chapter 2 of the Act sets out a number of general rules about the rights, obligations and liabilities of adjoining owners (under the heading of

⁸³ *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Qld) s 36. See [2.92]ff below.

⁸⁴ *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Qld) s 13(2).

⁸⁵ Explanatory Notes, *Neighbourhood Disputes Resolution Bill 2010* (Qld) 15.

⁸⁶ *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Qld) ss 33(3), 35(1)(b), (k).

'Neighbours' responsibilities') in relation to dividing fences. Its purpose is to provide rules about adjoining owners' responsibilities for a dividing fence, including their liability to contribute to carrying out fencing work, so that they are generally able to resolve dividing fence issues without a dispute arising.⁸⁷

When is a sufficient dividing fence required?

2.48 The Act provides that a sufficient dividing fence is required between two parcels of land if an adjoining owner requests a dividing fence.⁸⁸

Liability to contribute to carrying out fencing work

2.49 An adjoining owner is liable to contribute to carrying out fencing work for a sufficient dividing fence if there is no sufficient dividing fence between two parcels of adjoining land.⁸⁹ This applies even if there is an existing dividing fence that does not meet the standard of a sufficient dividing fence.⁹⁰ An adjoining owner may 'contribute' to fencing work by the payment of money or the provision of material or labour.⁹¹

2.50 Other than for urgent fencing work, the liability of an adjoining owner to contribute for fencing work is only enforceable under the Act if the adjoining owners have agreed under Chapter 2 about the fencing work to be carried out, and their contributions to it,⁹² or QCAT has ordered that the fencing work be carried out.⁹³

2.51 Generally, adjoining owners are liable to contribute equally to fencing work carried out for a sufficient dividing fence.⁹⁴ The intention is that a sufficient dividing fence should be the minimum standard required to divide the adjoining land, so that the contribution required from each owner is kept to a minimum.⁹⁵

2.52 The general rule does not apply if one owner wants to have more work done than is necessary for a fence that meets the standard of a sufficient dividing fence. In that case, that owner will be liable for the extra expense involved.⁹⁶ For example, if only one owner wants to have a dividing fence of a higher standard than a sufficient dividing fence for privacy and security, or wants to undertake more preparation of the land, including by trimming, lopping or removing more vegetation

⁸⁷ *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Qld) s 3(a).

⁸⁸ *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Qld) s 7(1).

⁸⁹ *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Qld) s 20(1).

⁹⁰ *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Qld) s 20(4).

⁹¹ *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Qld) s 31(6). See also Explanatory Notes, *Neighbourhood Disputes Resolution Bill 2010* (Qld) 11.

⁹² See *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Qld) ss 20(3)(a), 31–32.

⁹³ *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Qld) s 20(3)(b).

⁹⁴ *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Qld) ss 7(2)(a), 21(1).

⁹⁵ Explanatory Notes, *Neighbourhood Disputes Resolution Bill 2010* (Qld) 19.

⁹⁶ *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Qld) s 21(2).

than is necessary for the construction of a sufficient dividing fence, that owner will be liable to pay the extra cost.

2.53 The general rule also does not apply where rural or urban land adjoins a new residential development.⁹⁷ The following rules apply:

- Where rural land⁹⁸ consists of a parcel of prescribed rural land⁹⁹ and it adjoins all or part of a residential development that was previously also prescribed rural land, the owner of the rural land is required to contribute only to the cost of a dividing fence that would have been a sufficient dividing fence for the two parcels of land before the residential development.¹⁰⁰ A consequence of this rule is that an owner of agricultural land is not liable to contribute to a fence at all, if a fence has not been required previously.¹⁰¹
- Where urban land consists of a parcel of land greater than a size prescribed by regulation (prescribed land) and adjoins all or part of a residential development that was previously also prescribed land, the owner of the urban land is required to contribute only to the cost of a dividing fence that would have been a sufficient dividing fence for the two parcels of land before the residential development.¹⁰² This ensures that owners of larger properties in urban areas, who adjoin an area which is subdivided into residential lots, are not responsible for contributing to multiple, different dividing fences.¹⁰³

2.54 Other cases to which special contribution rules apply are:

- If a dividing fence is damaged by a negligent act or omission of an owner of land, or a person who has entered the owner's land with the owner's

⁹⁷ 'Residential development', for ch 2, means a subdivision of land creating allotments or lots intended for residential land: *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Qld) sch (definition of 'residential land').

⁹⁸ 'Rural land' means rural land under the *Land Valuation Act 2010* (Qld): *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Qld) sch (definition of 'rural land').

⁹⁹ 'Prescribed rural land' is agricultural land, pastoral land or other rural land of more than half a hectare primarily used for residential purposes: *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Qld) s 18(3). 'Agricultural land', 'pastoral land' and 'residential land' are defined in *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Qld) s 18(1)–(2), (4).

¹⁰⁰ *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Qld) s 22. See also, Explanatory Notes, *Neighbourhood Disputes Resolution Bill 2010* (Qld) 19, which state:

As Queensland increasingly develops, it is more common that a parcel of rural land is adjacent to a residential development. Ordinarily the obligation to fence the boundary between the residential development and the rural land should be dealt with in the planning instrument. Where that is silent, this clause ensures the owner of rural land is only liable for the cost of a dividing fence sufficient for rural purposes for which the parcel of land has been used.

¹⁰¹ See [2.21] above.

¹⁰² *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Qld) s 23.

¹⁰³ Explanatory Notes, *Neighbourhood Disputes Resolution Bill 2010* (Qld) 19. A regulation as to what is 'prescribed land' has not been made to date.

express consent, the owner is required to restore the fence to a reasonable standard, having regard to its state before it was damaged.¹⁰⁴

- In certain circumstances, a long-term lessee of an owner's land may be liable to contribute to the owner's share of fencing work for a sufficient dividing fence.¹⁰⁵ The lessee must be given a copy of any notice to contribute the owner gives, or has been given, to an adjoining owner.¹⁰⁶ The extent of the lessee's liability to contribute is dependent on the length of the lease and the unexpired term of the lease.¹⁰⁷
- If land controlled by the State that is excluded from the application of the Act¹⁰⁸ becomes freehold land, the person who acquired the freehold interest in the land from the State is liable to pay the owner of adjoining land half of the relevant fencing cost of the fencing work required for a sufficient dividing fence, if that owner has already constructed a dividing fence between their properties.¹⁰⁹ Section 25 of the Act, which has its origins in the 1828 NSW Act,¹¹⁰ applies whether the owner of adjoining land constructed the fence before or after the commencement of the Act (on 1 November 2011).

2.55 The Act also empowers QCAT, when deciding an application in relation to fencing work for a dividing fence, to make an order about the way in which contributions for fencing work are to be apportioned between adjoining owners or the amount that each adjoining owner is liable to pay for the fencing work.¹¹¹

¹⁰⁴ *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Qld) s 26. If the owner does not restore the dividing fence as required under s 26, the adjoining owner may give the owner a notice to contribute for fencing work under s 31 of the Act or carry out urgent fencing work and subsequently give the owner a notice to contribute for urgent fencing work under s 32 of the Act.

¹⁰⁵ *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Qld) s 24. This provision does not apply to a lessee under the *Retail Shop Leases Act 1994* (Qld), or where the owner is the State, a local government or is a lessee of a lease or licensee of a license granted under the *Land Act 1994* (Qld): s 24(1)(b), (6).

¹⁰⁶ *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Qld) s 24(3).

¹⁰⁷ *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Qld) s 24(2). A lessee's liability to contribute to the owner's share of fencing works is: if the unexpired term of the lease is 12 years or more, 100%; if the unexpired term of the lease is 7 to 12 years, 50%; or, if the unexpired term of the lease is 5 to 7 years, 25%. A lessee is not liable to contribute to the cost of fencing works if the unexpired term of the lease is less than 5 years.

¹⁰⁸ See *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Qld) s 8(2)–(4).

¹⁰⁹ *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Qld) s 25. The State must give the person who acquired the interest in the land notice of the person's liability to contribute: s 25(2). The 'relevant fencing cost' is the lesser of half of the cost of fencing work required to have a sufficient dividing fence at the date the fence was constructed or at the date the person becomes liable: s 25(3).

¹¹⁰ *An Act to regulate the dividing Fences of adjoining Lands 1828*, 9 Geo IV 12, s 2.

¹¹¹ *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Qld) s 35(1)(a). See [2.77] below.

Ownership of a dividing fence

2.56 The Act does not affect the common law position that a dividing fence, to the extent it is built on the common boundary, is owned equally by the adjoining owners.¹¹²

2.57 An owner must not, without the consent of the adjoining owner, attach something to a dividing fence that unreasonably and materially alters or damages the fence.¹¹³ The Explanatory Notes to the Neighbourhood Disputes Resolution Bill 2010 state that as a dividing fence is owned equally, 'it is inappropriate for one adjoining owner to unreasonably or materially alter or damage it'.¹¹⁴ If this occurs, the adjoining owner may apply to QCAT for an order to restore the fence, having regard to its state before the thing was attached.¹¹⁵

Urgent fencing work

2.58 If urgent fencing work is required to repair a damaged or destroyed dividing fence, an owner may restore the fence to a reasonable standard, having regard to its state before the damage or destruction, without first giving the adjoining owner a notice to contribute to urgent fencing work, but only if it is impracticable to give the notice.¹¹⁶ Under the 1953 Act, the owner was relieved of the requirement to first give notice only if the damage or destruction was caused by flood, fire, lightning, storm, tempest or accident.¹¹⁷ However, under the current Act, it does not matter how the damage or destruction was caused.

The location of a dividing fence

2.59 If carrying out fencing work includes construction or replacement of a sufficient dividing fence, the fence must be constructed or replaced on the common boundary other than to the extent it is impracticable to do so because of natural physical features.¹¹⁸

Agreement does not affect title or possession

2.60 The occupation of land on either side of a dividing fence, as a result of an agreement made under Chapter 2 of the Act that fencing work is to be carried out

¹¹² *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Qld) s 19.

¹¹³ *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Qld) s 27(1). Section 27 of the Act mentions a clothes line, carport, shade sail or sign as examples of an attachment that could unreasonably and materially alter or damage the fence.

¹¹⁴ Explanatory Notes, *Neighbourhood Disputes Resolution Bill 2010* (Qld) 20.

¹¹⁵ *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Qld) ss 27(2), 35(1)(j).

¹¹⁶ *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Qld) s 28. If an owner wants an adjoining owner to contribute to the reasonable costs incurred in restoring the fence, the owner must give the adjoining owner a notice to contribute to urgent fencing work: *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Qld) ss 30(2), 32.

¹¹⁷ *Dividing Fences Act 1953* (Qld) s 16(2A)(b), (c) (repealed).

¹¹⁸ *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Qld) s 20(2).

on a line other than on the common boundary of the adjoining lands, does not affect the title to or possession of the land.¹¹⁹

- 2-6 Do the rules about neighbours' responsibilities contained in Part 3 of Chapter 2 of the Act adequately promote the resolution of dividing fence issues by adjoining owners?**
- 2-7 If not, how could the statement of those rules be changed or better expressed so that they do promote the resolution of dividing fence issues by adjoining owners?**
- 2-8 Should section 25 of the Act (which makes the owner who first acquires the freehold of land controlled by the State liable to contribute to half of the costs of an already constructed fence) be changed or repealed?**

PROCEDURE FOR OBTAINING A CONTRIBUTION FOR FENCING WORK

Notice to contribute

2.61 Part 4 of Chapter 2 of the Act sets out the procedure to be followed when seeking a contribution to fencing work. It provides that an owner may require an adjoining owner to contribute to fencing work for a dividing fence by serving a 'notice to contribute' on the adjoining owner.¹²⁰

2.62 The notice to contribute must be in the approved form and contain a description of the land on which the fencing work is to be carried out (and, if the fencing work is to construct or replace a dividing fence, the line on which it is proposed to construct or replace the fence), the type of fencing work to be carried out and the estimated cost of the fencing work to be carried out, including the cost of labour and materials. It must also attach at least one written quote for the cost of the fencing work. The owner giving the notice may propose that any cost of the fencing work is to be borne other than in equal proportions. If that is the case, the notice must also state the proposed proportions.¹²¹

2.63 If, in the circumstances, urgent fencing work is required to repair a damaged or destroyed dividing fence, an owner who restores the fence to a reasonable standard without first giving a notice to contribute (because it was impracticable to give the notice at that time) may later give a notice to contribute to urgent fencing work to the adjoining owner to contribute to the reasonable cost

¹¹⁹ *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Qld) s 29.

¹²⁰ *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Qld) s 31(1).

¹²¹ *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Qld) s 31(2)–(5). Section 40 of the Act sets out a procedure which adjoining owners may use if they do not agree about the position of the common boundary for the purposes of carrying out fencing work for a dividing fence. See [2.70]–[2.74] below.

incurred in restoring the fence.¹²² The notice must be in the approved form and contain a description of the land on which the fencing work was carried out, the reason urgent fencing work was required, the type of fencing work carried out and any cost incurred for the fencing work. The owner giving the notice may propose that any cost of the fencing work is to be borne other than in equal proportions. The notice must also attach a receipt for the cost of the fencing work.¹²³

2.64 If, within one month after a notice is given, the adjoining owners have not agreed about the proposed fencing work and their contributions to it (or, in the case of urgent fencing work, their contributions to the fencing work that was carried out), either owner may apply to QCAT for an order about the fencing work.¹²⁴

2.65 An application to QCAT must be made within two months after a notice is given, and QCAT may make orders about a range of matters, including the fencing work to be carried out and the way in which contributions for the fencing work are to be apportioned, or alternatively that, in the circumstances, no sufficient dividing fence is required.¹²⁵

2.66 Unless there is a need for urgent fencing work, neither adjoining owner may carry out fencing work for a dividing fence, or arrange to have fencing work carried out, until they have agreed about the proposed fencing work and their contributions to it,¹²⁶ or QCAT has made an order to resolve the dispute.¹²⁷ This reflects the practical importance of complying with the procedures under the Act for obtaining a contribution for fencing work for a dividing fence. An owner who does not comply with those procedures cannot invoke the provisions of the Act to require a contribution from the adjoining owner:¹²⁸

Probably the most important practical point which must be remembered about [the dividing fences legislation] is that in order to enforce a liability on a neighbour for contribution to the cost of [fencing work for] a dividing fence the terms of the Act must be complied with. Thus, for example, an owner who builds a dividing fence without giving the appropriate notice to his neighbour and then reaching agreement or obtaining an order, cannot demand a ... contribution to the cost of the fence. If this situation arises the common law applies and, in the absence of an enforceable agreement or covenant, the adjoining owner will be under no liability.

¹²² *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Qld) ss 28, 32(1)–(2).

¹²³ *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Qld) s 32(3)–(5).

¹²⁴ *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Qld) ss 31(6), 32(6).

¹²⁵ *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Qld) ss 31(6), 32(6), 35.

¹²⁶ *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Qld) s 31(7).

¹²⁷ *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Qld) ss 33(1), 35. See also *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Qld) s 37, which, in certain circumstances, empowers QCAT, in the absence of an adjoining owner, to make an order authorising fencing work to be carried out.

¹²⁸ I Wallace, 'The Law of Dividing Fences' (1981) 19(7) *Law Society Journal* (NSW) 539, 543, discussing the equivalent provisions in the NSW dividing fences legislation. See, eg, *Creighton v Skull* [2012] QCAT 652; *Cordingley v Jarvis* [2012] QCAT 701.

2-9 Are there any changes that should be made to improve the procedure under the Act for obtaining a contribution to fencing work for a dividing fence?

Approved forms

2.67 The Act requires a notice to contribute to fencing work (and a notice to contribute to urgent fencing work) to be in the approved form.¹²⁹ It also provides that substantial compliance with the notice is adequate for the Act.¹³⁰

2.68 The approved forms provide information about the relevant notice procedure and the legal remedies available under the Act. Each of the forms also includes a template form of agreement, which together with the completed notice form, may be used to establish proof of the existence and terms of any agreement the adjoining owners may reach.

2.69 The approved form of the notice to contribute and of the notice to contribute to urgent fencing work are available online.¹³¹

2-10 Are the approved forms of the notice to contribute and the notice to contribute for urgent fencing work accessible and easy to understand and use? Are there any changes that should be made to improve either form?

PROCEDURE IF COMMON BOUNDARY NOT AGREED

2.70 If adjoining owners disagree about the position of the common boundary for the purposes of carrying out fencing work for a dividing fence, they may use the procedure set out in Chapter 2 Part 6 of the Act to resolve the dispute.¹³²

2.71 Either owner may commence the procedure by giving a written notice of that owner's intention to have the common boundary surveyed by a cadastral (registered) surveyor to the adjoining owner.¹³³

¹²⁹ *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Qld) ss 30(2), 31(2), 32(3). See *Cordingley v Jarvis* [2012] QCAT 701, in which it was held that QCAT had no jurisdiction to make the orders sought in relation to the construction of a dividing fence under s 31 of the Act where a notice in the approved form had not been served.

¹³⁰ *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Qld) s 91.

¹³¹ The approved form of the notice to contribute (*Form 2 – Notice to Contribute for Fencing Work*) is available at <<http://www.qld.gov.au/law/housing-and-neighbours/disputes-about-fences-trees-and-buildings/resolving-tree-and-fence-disputes/resolving-dividing-fence-disputes-with-qcat/>>. The approved form of the notice to contribute for urgent fencing work (*Form 1 – Notice to Contribute for Urgent Fencing Work*) is available online at: <<http://www.qld.gov.au/law/housing-and-neighbours/disputes-about-fences-trees-and-buildings/resolving-tree-and-fence-disputes/resolving-dividing-fence-disputes-with-qcat/>>.

¹³² See *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Qld) s 40.

2.72 Within one month of receiving the notice, the adjoining owner may give written advice of the common boundary to the owner who gave the notice or engage a registered surveyor to define the common boundary.¹³⁴

2.73 If, after one month from the date the notice was given, the adjoining owner has not had the common boundary defined, the owner who gave the notice may engage a registered surveyor to define the common boundary.¹³⁵

2.74 Generally, the reasonable costs of the survey are to be paid equally by the owners.¹³⁶ However, if the adjoining owner advised the location of the common boundary, but the owner who gave the notice did not agree and had the boundary surveyed, and the survey shows that the location of the boundary is in about the same position as the adjoining owner advised, the adjoining owner is not required to contribute to the cost of the survey.¹³⁷ In that case, the owner who gave the notice is required to bear the full costs.

2-11 Does the procedure for resolving disputes between adjoining owners about the position of the common boundary for the purposes of carrying out fencing work:

- (a) clearly define their obligations and the steps they are required to follow; and**
- (b) provide for the fair apportionment of the costs of a registered surveyor?**

2-12 Are there any changes that should be made to improve the procedure?

QCAT: JURISDICTION AND POWERS

2.75 Chapter 2 of the Act gives QCAT jurisdiction to hear and decide 'any matter arising under [that Chapter] about a dividing fence'.¹³⁸ Those matters include disputes about carrying out fencing work where a notice to contribute has been given and carrying out unauthorised fencing work.

¹³³ *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Qld) s 40(2). For the purposes of s 40, a 'cadastral surveyor' is a person registered as a cadastral surveyor under the *Surveyors Act 2003* (Qld): s 40(7).

¹³⁴ *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Qld) s 40(3).

¹³⁵ *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Qld) s 40(4).

¹³⁶ *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Qld) s 40(6).

¹³⁷ *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Qld) s 40(5).

¹³⁸ *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Qld) s 33(1).

2.76 A claim that is the subject of a dividing fence dispute under Chapter 2 of the Act, and is for an amount not more than \$25 000, is heard in QCAT's 'minor civil dispute' jurisdiction.¹³⁹

Orders about carrying out fencing work

2.77 Section 35(1) of the Act provides that QCAT may, for an application in relation to fencing work for a dividing fence, decide and order any one or more of the following:

- (a) the line on which the fencing work is to be carried out, whether or not that line is on the common boundary of the adjoining land;
- (b) the fencing work to be carried out, including the kind of dividing fence involved;
- (c) the way in which contributions for the fencing work are to be apportioned or reapportioned or the amount that each adjoining owner is liable to pay for the fencing work;
- (d) the part of the dividing fence to be constructed or repaired by either adjoining owner;
- (e) the time by which the fencing work is to be carried out;
- (f) any other work to be carried out that is necessary to carry out the fencing work ordered under [section 35] including work for a retaining wall;
- (g) that, in the circumstances, no dividing fence is required for all or part of the boundary of the adjoining lands;
- (h) that a fence has been used, or could reasonably be used, as a dividing fence under section 15 [of the Act];¹⁴⁰
- (i) the amount of compensation payable to an adjoining owner for damage or destruction to a dividing fence caused by another adjoining owner or a person mentioned in section 26(1)(b) [of the Act];¹⁴¹
- (j) that an adjoining owner remove a thing attached to a dividing fence and restore the dividing fence; and
- (k) the amount of compensation payable to an adjoining owner for the removal of a fence if ordered under section 33(3) [of the Act].¹⁴²

¹³⁹ *Queensland Civil and Administrative Tribunal Act 2009* (Qld) ss 10(1)(a), 11–14, sch 3 (definition of 'minor civil dispute' para 1(f)), (definition of 'prescribed amount'). This is part of QCAT's original jurisdiction to hear and decide a minor civil dispute. See also *Queensland Civil and Administrative Tribunal Act 2009* (Qld) ss 10(1)(b), 15–16, in relation to the exercise of original jurisdiction conferred on QCAT by s 33(1) of the Act to decide a matter in the first instance. QCAT's jurisdiction to hear and decide disputes about dividing fences and trees is discussed at [4.30]ff below.

¹⁴⁰ *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Qld) s 15(2)(b) provides QCAT may make that decision in relation to owners of agricultural or pastoral land on either side of a road (as 'adjoining owners').

¹⁴¹ See *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Qld) s 26(2)(b), which provides that, if a dividing fence is damaged or destroyed by a negligent or deliberate act or omission of a person who has entered the owner's land with the express consent of the owner, the owner must restore the dividing fence to a reasonable standard, having regard to its state before the damage or destruction.

2.78 Section 35(2) provides that the occupation of land on either side of a dividing fence, as a result of an order made by QCAT that fencing work is to be carried out on a line other than on the common boundary of the adjoining lands, does not affect the title to or possession of the land.

Order for work for a retaining wall¹⁴³

2.79 For the purposes of the Act, a retaining wall is defined as 'a structure that supports excavated or filled earth'.¹⁴⁴ In some instances, to fully resolve a dispute about fencing work for a dividing fence (which is ordinarily built on the common boundary of neighbouring properties), it may be necessary to carry out work on a retaining wall. Although the Act does not generally deal with retaining walls, section 35(1)(f) gives QCAT, on an application in relation to fencing work for a dividing fence, a limited power to order work for a retaining wall.

Legal aspects of retaining walls

2.80 Section 179 of the *Property Law Act 1979* (Qld) attaches an obligation to any land not to do anything on or below the land to withdraw support from any other land or from any building, structure or erection placed on it.¹⁴⁵ Consequently, an owner of land who excavates the land (lowering its ground level) and builds a retaining wall or other measure to support the adjoining land must ensure that the wall or other measure is structurally adequate to prevent the subsidence of the adjoining land, or the collapse of the buildings or structures on it.

2.81 An infringement of section 179 is actionable in nuisance. A nuisance action may also lie under the common law if an owner or occupier removes support to an adjoining owner's land and thereby causes the land to subside.¹⁴⁶ This

¹⁴² Section 33(3) of the Act is discussed at [2.91] below.

¹⁴³ Paragraph 3(i) of the terms of reference requires the Commission to consider whether 'the scope of the *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Qld) should be expanded to include disputes about retaining walls built on neighbouring properties' boundaries'. The terms of reference are set out in full in Appendix A of this Discussion Paper.

¹⁴⁴ *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Qld) sch (definition of 'retaining wall').

¹⁴⁵ Section 179 of the *Property Law Act 1974* (Qld) does not create a positive obligation upon a contiguous landowner to give support, only a negative obligation not to withdraw it: Thomson Reuters Westlaw AU; *Property Law and Practice Qld* (at 24 April 2015) 'Property Law Act 1974 (Qld): 179 Right to support of land and buildings'.

¹⁴⁶ The withdrawal of lateral support from land is an actionable nuisance for which strict liability attaches without proof of any negligence: *Dalton v Henry Angus & Co* (1881) 6 App Cas 740, 791; *Pantalone v Alouie* (1989) 18 NSWLR 119, 129.

common law action is limited to the support of land in its natural state¹⁴⁷ and does not extend to structures upon the land.¹⁴⁸

2.82 The removal of lateral support is actionable when damage occurs or is threatened; however, this need not be physical damage and may include an infringement of rights or interference with enjoyment of property that occurs before subsidence of land.¹⁴⁹ The affected landowner is entitled to sue for damages or an injunction to stop the continuance of any acts which may lead to a withdrawal of the support in the future.¹⁵⁰

2.83 Filling land (thereby raising its ground level) without providing a structurally adequate retaining wall or other measure may result in soil falling onto the adjoining land, and may also cause damage to buildings and other structures on it. In that situation, the owner is liable at common law in trespass, and possibly in nuisance where the inconvenience to the adjoining owner is unreasonable and substantial.¹⁵¹

2.84 Retaining walls are also subject to requirements imposed by the *Building Act 1975* (Qld), the *Sustainable Planning Act 2009* (Qld) and local government laws and planning schemes. A building development approval is required under the *Building Act 1975* (Qld) for a retaining wall that has a height of more than 1 metre above the wall's natural ground surface.¹⁵² A retaining wall under this height does

¹⁴⁷ Loss of support is not protected if the land has been filled and is not in its natural state: *Sutherland Shire Council v Becker* (2006) 150 LGERA 184; *Hicks v Lake Macquarie CC* (1992) 77 LGRA 261 (NSWSC).

¹⁴⁸ *Jemena Gas Networks (NSW) Ltd v Mine Subsidence Board* (2011) 243 CLR 558; A Stickley, *Australian Torts Law* (3rd ed, 2013) 590; A Bradbrook and M Neave, *Easements and Restrictive Covenants in Australia* (Butterworths, 2nd ed, 2000) [7.15]. If support is withdrawn and land subsides, and the subsidence is not the result of the additional weight of structures upon the land, then in addition to damages for subsidence of the land, the owner may also recover damages for injury to any structures: *Brouwers v Street* [2011] 1 NZLR 645; *SJ Weir Ltd v Bijok* [2011] SASCFC 165. See also RP Balkin and JLR Davis, *Law of Torts* (Butterworths, 5th ed, 2013) 472–3; Law Reform Commission of Western Australia, *Alteration of Ground Levels Report*, Project No 44 (1986) 8–9.

¹⁴⁹ *De Pasquale Bros Pty Ltd v Cavanagh Biggs & Partners Pty Ltd* [2000] 2 Qd R 461, [52]; *Barbagallo v J & F Catelan Pty Ltd* [1986] 1 Qd R 245, 248. Note also that where a court has jurisdiction a *quia timet* injunction may be granted to address harm that is reasonably feared to be imminent.

¹⁵⁰ *De Pasquale Bros Pty Ltd v Cavanagh Biggs & Partners Pty Ltd* [2000] 2 Qd R 461, [52]; *Barbagallo v J & F Catelan Pty Ltd* [1986] 1 Qd R 245, 248.

¹⁵¹ See Law Reform Commission of Western Australia, *Alteration of Ground Levels Report*, Project No 44 (1986) 8–9. See also *Yared v Glenhurst Gardens Pty Ltd* [2002] NSWSC 11, [105], [107]–[108]; *Levet v Dalla* [2012] ACTSC 23, [15]. The fall of soil raises different considerations from those raised by the withdrawal of support: see *Carroll v Azolia Pty Ltd* [1998] ANZ ConvR 485; *Sutherland Shire Council v Becker* (2006) 150 LGERA 184, [74]. In *Carroll v Azolia Pty Ltd*, Wheeler J commented in relation to the fall of filled soil from the plaintiff's land onto the defendant's land [at 487]:

The right to support is a right to support from adjacent or sub-adjacent soil. Although in shorthand referred to as a right to support, it is clearly more properly described as a right not to have any support of land removed by means of digging or mining upon the adjacent or sub-adjacent land: see, for example, *Gale on Easements* (16th ed) Chapter 10, Bradbrook and Neave, *Easements and Restrictive Covenants in Australia* (1981) Chapter 7 and, of course, *Dalton v Angus* [1881] 6 AC 740. It is plain that no issue arose in this case of any possibility of removal of support from the defendant's property by any mining or excavation on the plaintiff's land. The defendant's only concerns were with fall of soil from the plaintiff's property onto his, and with the existence or otherwise of an adequate dividing fence and/or retaining wall.

¹⁵² *Building Regulation 2006* (Qld) s 4, sch 1 item 3(1)(b). The term 'height' includes the total height of the wall and of the fill or cut retained by the wall. 'Natural ground surface' for a building, device or structure means the ground surface located at the site of the building or structure on the day the first plan of survey showing the

not require building approval¹⁵³ unless there is also a surcharge loading over the zone of influence,¹⁵⁴ the retaining wall is closer than 1.5 metres to a building or another retaining wall¹⁵⁵ or the retaining wall forms part of the fencing for a regulated pool.¹⁵⁶ In some instances, the construction of a retaining wall may be required as a condition of a building development approval.¹⁵⁷ Alternatively, or in addition, the building of a retaining wall may require approval by a local government under a planning scheme.¹⁵⁸ The *Building Act 1975* (Qld) also provides, in certain circumstances, for a local government to require a person to repair a dangerous or dilapidated retaining wall, and, in some circumstances, to take action itself to repair the wall.¹⁵⁹

relevant allotment was first registered: *Building Regulation 2006* (Qld) sch 4 (definition of 'natural ground surface').

¹⁵³ A retaining wall that does not require building approval is 'self-assessable building work' (because it is a self-assessable development): *Building Act 1975* (Qld) s 21; *Building Regulation 2006* (Qld) s 4 sch 1 item 3. 'Building work' includes 'building, repairing, altering, underpinning (whether by vertical or lateral support), moving or demolishing a building or other structure': *Building Act 1975* (Qld) s 5(1). A 'structure' includes 'a wall or fence and anything fixed to or projecting from a building, wall, fence or other structure': sch 2 (definition of 'structure'). All building work is assessable development and requires a development permit unless it is exempt or self-assessable development: ss 20–21.

¹⁵⁴ *Building Regulation 2006* (Qld) s 4, sch 1 item 3(1)(a). A 'surcharge loading' is a load applied to a soil stratum that has, or may have, the effect of consolidating the stratum, other than loads arising only from people or vehicles moving over it or the effects of rain on it: *Building Regulation 2006* (Qld) sch 1 item 3(3) (definition of 'surcharge loading'). The 'zone of influence' for the retaining wall is the volume of soil behind the wall that affects the wall's structural integrity: *Building Regulation 2006* (Qld) sch 1 item 3(3) (definition of 'zone of influence').

¹⁵⁵ *Building Regulation 2006* (Qld) s 4, sch 1 item 3(1)(c).

¹⁵⁶ *Building Regulation 2006* (Qld) s 4, sch 1 item 3(2). *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Qld) ch 2 pts 3–6 do not apply to a dividing fence that forms part of a pool safety barrier of a 'regulated pool' within the meaning of the *Building Act 1975* (Qld).

¹⁵⁷ The *Building Act 1975* (Qld) includes a number of restrictions and obligations that are taken to be conditions of building development approvals to which they relate: *Building Act 1975* (Qld) ch 4 pt 5 div 1. If the soil conditions, ground levels, excavation or filling make it necessary to protect land, buildings or structures in the neighbourhood of building work, then it is taken to be a condition of the approval that retaining walls must be built (or another suitable method used) to prevent soil movement: s 75(a). Drainage of the land, buildings or structures must also be provided: s 75(b). A further condition is that, if a building development approval permits a building or land to be drained, the drainage must be carried out in a way that protects land, buildings and structures in the neighbourhood of the building or land: s 76.

¹⁵⁸ Each local government has a planning scheme which sets out rules in relation to maximum heights and boundary setbacks, for retaining walls and situations where a fence is built on top of a retaining wall. If a proposed retaining wall does not comply with those rules, an application must be made to build the non-compliant structure. This type of approval is commonly referred to as a 'planning approval', a 'siting variation' or a 'siting relaxation'. To access local government planning schemes, see: <<http://www.statedevelopment.qld.gov.au/local-area-planning/local-government-planning-schemes.html>>.

¹⁵⁹ *Building Act 1975* (Qld) ss 248(1), 249, 252; *Local Government Act 2009* (Qld) s 142. For who may decide whether enforcement action ought to be taken for a building development approval, see *Building Act 1975* (Qld) ss 10, 48 and *Sustainable Planning Act 2009* (Qld), ch 7 pt 3 divs 2–3.

Neighbourhood Disputes (Dividing Fences and Trees) Act 2011 (Qld)

2.85 Previously, there had been some uncertainty as to whether the 1953 Act applied to retaining walls as well as dividing fences.¹⁶⁰ The current Act specifically excludes a retaining wall from the definition of ‘fence’.¹⁶¹ As a result, retaining walls are not considered to be ‘dividing fences’ for the purposes of Chapter 2 of the Act.¹⁶² The Explanatory Notes to the Neighbourhood Disputes Resolution Bill 2010 (Qld) state the policy reasons for making this distinction:¹⁶³

Retaining walls and fences serve different purposes. The purpose of a retaining wall is to support excavated or filled earth.

As the NSW Law Reform Commission stated in its Report 59 (1988) Community Law Reform Program: Dividing Fences, at paragraph 4.8:

Retaining walls serve quite different purposes from fences. They are usually substantial and expensive structures which repose within the subsurface of the land of one adjoining owner, and are therefore required to withstand considerable lateral stress. They also interfere with the cross-flow of subterranean water and so must normally include weep holes and other drainage works. The foundations or footings often encroach substantially upon the downward adjoining landowner. Retaining walls are usually erected solely for the benefit of the owner who undertakes excavation work

Alternatively, retaining walls can be established to support ‘built up’ earth. Generally retaining walls involve engineering specifications prior to construction. They are more than the mere levelling of dirt.

Unlike fences, it is not usually possible to make both adjoining owners liable for the cost of maintaining, repairing or replacing a retaining wall. This is because usually a retaining wall is of greater benefit to one of the adjoining owners.

¹⁶⁰ In *Jackson v Randall* [2000] 2 Qd R 31, the Supreme Court of Queensland held that a retaining wall fell within the definition of a ‘dividing fence’ for the purposes of the 1953 Act if it was erected for the purpose of marking a boundary, notwithstanding that it was also erected for another purpose such as retaining soil. In such instances, each party’s contributions to the cost of the dividing fence could be attributed so as to reflect their obligations regarding the retention of soil. *Jackson v Randall* was distinguished in later decisions: see *Galea v Ruffini* [2011] QMC 11; *Cox v Lashmar* [2011] QCAT 708; *De Zubicaray v Horsten* [2012] QCATA 178.

¹⁶¹ Specifically, the definition of ‘fence’ in the Act distinguishes what is a foundation for a fence from a retaining wall: *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Qld) s 11(1)(c), (2) . This is intended to overturn the decision in *Jackson v Randall* [2000] 2 Qd R 31: Explanatory Notes, Neighbourhood Disputes Resolution Bill 2010 (Qld) 14.

¹⁶² It was noted in the DJAG review that stakeholders generally supported this approach: Deputy Premier and Attorney-General, Minister for Local Government and Special Minister of State, ‘Neighbourhood Disputes Resolution Bill 2010: Results of Consultation Process’ (November 2010) 3 at Department of Premier and Cabinet (Qld), *Cabinet documents* (6 August 2014) <<http://rti.cabinet.qld.gov.au/cabinet.aspx>>.

¹⁶³ Explanatory Notes, Neighbourhood Disputes Resolution Bill 2010 (Qld) 14.

2.86 However, section 35(1)(f) of the Act gives QCAT a limited power to deal with disputes about retaining walls.¹⁶⁴ It provides that QCAT may, for an application in relation to fencing work for a dividing fence, decide and order 'any other work to be carried out that is necessary to carry out the fencing work ordered under [section 35] including work for a retaining wall'.¹⁶⁵

2.87 An order of this kind may be 'necessary' when 'the structure of the dividing fence is or would be compromised by the failure of a retaining wall and cannot be repaired or constructed unless the retaining wall is repaired'.¹⁶⁶

2.88 Section 35(1)(f) confers on QCAT a practical and expedient jurisdiction to deal with retaining walls in limited circumstances. It enables QCAT to make orders to fully resolve a dispute about fencing work for a dividing fence where that work cannot be completed without an ancillary order being made for work for a retaining wall (and where the total amount of the claim is for not more than the jurisdictional limit of \$25 000 which applies for a dividing fences dispute heard as a minor civil dispute).

2.89 Chapter 2 of the Act does not give any additional power to QCAT to make an order to resolve a dispute about a retaining wall in circumstances that are outside the scope of section 35(1)(f). It also does not affect the law about retaining walls or rights of support, including easements of support.¹⁶⁷ This preserves a person's obligations, rights and liabilities under the statute and common law in relation to retaining walls.¹⁶⁸

2-13 Are there any changes that should be made in relation to the powers conferred on QCAT by section 35(1) of the Act?

2-14 Are there any changes that should be made in relation to the power conferred on QCAT by section 35(1)(f) of the Act to order work for a retaining wall that is necessary to carry out fencing work for a dividing fence ordered under section 35?

¹⁶⁴ Ibid 23. The Explanatory Notes do not explain why s 35(1)(f) was included in the Act, notwithstanding that retaining walls are generally outside the scope of Chapter 2 of the Act. However, it was noted in the DJAG review that local governments favoured the introduction of simplified remedies for dealing with repairs to retaining walls: Deputy Premier and Attorney-General, Minister for Local Government and Special Minister of State, 'Neighbourhood Disputes Resolution Bill 2010: Results of Consultation Process' (November 2010) 3 at Department of Premier and Cabinet (Qld), *Cabinet documents* (6 August 2014) <<http://rti.cabinet.qld.gov.au/cabinet.aspx>>.

¹⁶⁵ An order for 'any other work to be carried out that is necessary to carry out the fencing work ordered under [section 35]' also covers works such as drainage that are necessary for the repair a dividing fence: Explanatory Notes, Neighbourhood Disputes Resolution Bill 2010 (Qld) 14.

¹⁶⁶ Ibid 23.

¹⁶⁷ *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Qld) s 10.

¹⁶⁸ Eg, the *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Qld) does not prejudice a person's right to make an application under s 184 of the *Property Law Act 1974* (Qld) for relief in respect of an encroachment onto the person's land.

Orders about the removal of a fence in certain circumstances

2.90 The Act empowers QCAT, under section 33(2), to decide which of two or more fences on the boundary of adjoining land is the dividing fence and to order the removal of the other fence or fences.¹⁶⁹ This provision enables QCAT to deal with the situation where adjoining owners have each built a fence to their own specifications on the boundary of their land.

2.91 Section 33(3) provides that, if there is a fence, other than a dividing fence, on adjoining land, QCAT may order that it be removed if QCAT considers its removal is necessary to allow fencing work for a dividing fence.¹⁷⁰ If QCAT orders the removal of the adjoining owner's fence, it may also order the other owner to pay compensation to the adjoining owner.¹⁷¹

2-15 Are there any changes that should be made in relation to the powers conferred on QCAT by section 33(2) and (3) of the Act to order the removal of a fence?

Sufficient dividing fence matters

2.92 In deciding an application about whether a dividing fence is a sufficient dividing fence, QCAT may consider all the circumstances of the application, including the following:¹⁷²

- any existing or previously existing dividing fence;
- the purposes for which the two parcels of land consisting of the adjoining land are used or intended to be used;
- the kind of dividing fence normally used in the area;
- whether the dividing fence is capable of being maintained by the adjoining owners;
- any policy adopted, or local law made, in relation to dividing fences by a local government for the area where either parcel of land is situated;
- any requirement for fencing work in a development approval for the land of either adjoining owner; and
- any written agreement made between the adjoining owners for the purposes of [Chapter 2 of the Act].

¹⁶⁹ *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Qld) s 33(2).

¹⁷⁰ *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Qld) s 33(3). See [2.46] above.

¹⁷¹ *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Qld) s 35(1)(k).

¹⁷² *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Qld) s 36.

2.93 A factor QCAT may consider is ‘any existing or previously existing dividing fence’. The Explanatory Notes to the *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Qld) state that:¹⁷³

As older suburbs are re-developed or become more fashionable, newer residents may desire a more elaborate fence than has previously been common in the area. In those circumstances, the fact that previously a shorter paling or chain wire fence has been used as a dividing fence is a highly relevant consideration in deciding what is sufficient. A related factor is the kind of fence normally used in the area.

2.94 Another factor QCAT may consider is ‘whether the dividing fence is capable of being maintained by the adjoining owners’. This is intended to refer to an adjoining owner’s physical and financial capacity to maintain the fence. The Explanatory Notes to the *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Qld) state that, if a fence is beyond the financial means of one adjoining owner to maintain in the future, ‘then it is not a sufficient dividing fence’.¹⁷⁴ The adjoining owner’s capacity is a constraint on what may constitute a sufficient dividing fence.

2.95 In Victoria, the dividing fences legislation also requires the court to consider ‘the reasonable privacy concerns of the owners of the adjoining lands’.¹⁷⁵ Similarly, the New South Wales Act lists ‘the privacy or other concerns of the adjoining land owners’ as a factor for the court or tribunal to consider.¹⁷⁶ In its 1988 review of dividing fences legislation then in force in New South Wales, the New South Wales Law Reform Commission noted that one of the main purposes for which fences are built in urban areas is to secure privacy for adjoining owners, and that the law should reflect the interests of owners in this regard.¹⁷⁷ In Queensland, privacy and security were raised, during the consultation for the DJAG review, as additional factors that could be relevant when determining whether a fence is a ‘sufficient dividing fence’.¹⁷⁸ However, those matters were not included in the Queensland Act because they were considered to be matters that should be negotiated between adjoining owners.¹⁷⁹

There are differences in the expectations of the community about the purpose of a dividing fence. In compelling financial contribution, the [Neighbourhood Disputes Resolution Bill] seeks to force contribution to the minimum necessary to divide. Where an old serviceable chain wire fence exists, it is not intended

¹⁷³ Explanatory Notes, *Neighbourhood Disputes Resolution Bill 2010* (Qld) 23.

¹⁷⁴ *Ibid* 23.

¹⁷⁵ *Fences Act 1968* (Vic) s 6(1)(c).

¹⁷⁶ *Dividing Fences Act 1991* (NSW) s 4(c).

¹⁷⁷ New South Wales Law Reform Commission, *Community Law Reform Program: Dividing Fences*, Report No 59 (1988) [3.26].

¹⁷⁸ Deputy Premier and Attorney-General, Minister for Local Government and Special Minister of State, ‘Neighbourhood Disputes Resolution Bill 2010: Results of Consultation Process’ (November 2010) 4 at Department of Premier and Cabinet (Qld), *Cabinet documents* (6 August 2014) <<http://rti.cabinet.qld.gov.au/cabinet.aspx>>.

¹⁷⁹ *Ibid* 4–5.

that it should be replaced. Factors such as a desire for privacy or security need to be issues of negotiation between neighbours, not forced contribution.

2-16 Is the non-exhaustive list of factors that QCAT may consider when deciding whether a fence is a sufficient dividing fence appropriate? Should the list be changed in any way (for example, by adding a new factor or changing or removing an existing factor)?

Order in absence of adjoining owner

2.96 Sometimes, an owner may encounter practical difficulties in locating or giving a notice to contribute to the adjoining owner. To deal with this situation, the Act makes provision, in certain circumstances, for an owner to apply to QCAT for an order authorising the carrying out of fencing work, and the contributions to be made for the work, in the absence of an adjoining owner.¹⁸⁰

2.97 QCAT has power to make such an order only if it is satisfied that the owner has made reasonable inquiries to locate the adjoining owner (for example, by searching the electoral roll, or making enquiries with real estate agents or other neighbours or contacting the local government).¹⁸¹

2.98 If the owner who carries out the fencing work authorised by QCAT later locates the adjoining owner, the owner may give a copy of the order to the adjoining owner and, after one month from the date the copy is given, recover the adjoining owner's share of the cost of the works as stated in the order.¹⁸² The adjoining owner, if given a copy of the order, may, within one month after being given the copy, also apply for a variation of the order.¹⁸³ It does not matter whether the owner or adjoining owner has, after the order was made by QCAT, ceased to own their respective parcels of land.¹⁸⁴

Orders dealing with unauthorised construction or demolition

2.99 The Act introduced new procedures for dealing with the 'unauthorised' construction or demolition of a dividing fence¹⁸⁵ (that is, construction or demolition that is not the subject of an agreement under a notice to contribute for fencing work

¹⁸⁰ *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Qld) s 37(1).

¹⁸¹ *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Qld) s 37(2).

¹⁸² *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Qld) s 37(3).

¹⁸³ *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Qld) s 37(4).

¹⁸⁴ *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Qld) s 37(5).

¹⁸⁵ *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Qld) ch 2 pt 5 (ss 38–39).

or a QCAT order).¹⁸⁶ This might arise, for example, where an adjoining owner constructs a new dividing fence (which may or may not involve the demolition of an existing dividing fence) without seeking any agreement or a contribution from the adjoining owner.

2.100 If an owner believes on reasonable grounds that an adjoining owner intends to construct or demolish a dividing fence without authorisation, the owner may apply to QCAT for an order to prevent the construction or demolition.¹⁸⁷ The owner is required to give the adjoining owner a copy of the application at least one day before it is heard.¹⁸⁸ The short period of notice reflects the urgent nature of the application, particularly where the fence is being demolished without permission. The aim is to provide ‘a fast and accessible’ remedy to halt work on the fence so that ‘constructive negotiations can [then] take place between the parties’.¹⁸⁹ Consistent with that approach, these applications are generally listed for hearing without first being referred for mediation by QCAT.¹⁹⁰

2.101 If unauthorised construction or demolition of a dividing fence has occurred already, the owner may apply to QCAT for an order requiring the adjoining owner to remove, modify or rectify the fence.¹⁹¹ The owner must give the adjoining owner a copy of the application at least three days before the application is heard.¹⁹² QCAT can also order the adjoining owner to bear the costs of the work involved.¹⁹³

2-17 Are the procedures set out in sections 38 and 39 of the Act sufficient to deal with any issues relating to the construction or demolition of a dividing fence that occurs without authorisation? Are there any changes that should be made to improve them?

¹⁸⁶ ‘Authorisation’, for a dividing fence, means the adjoining owners have agreed under Chapter 2 of the Act about fencing work to be carried out for the dividing fence or QCAT has ordered that fencing work be carried out for the dividing fence: *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Qld) s 17. The definition of ‘fencing work’, for a dividing fence, includes the construction, replacement or removal of the dividing fence: s 16(a).

¹⁸⁷ *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Qld) s 38(1), (3). See, eg, *McKeown v Reid* [2013] QCAT 345; *Diachkoff v Hoeft-Marwick* [2012] QCAT 281.

¹⁸⁸ *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Qld) s 38(2).

¹⁸⁹ Queensland, *Parliamentary Debates*, Legislative Assembly, 2 August 2011, 2292 (PT Lucas, Deputy Premier, Attorney-General, Minister for Local Government and Special Minister of State).

¹⁹⁰ QCAT Practice Direction No 4 of 2011, *Arrangements for the mediation and determination of minor civil disputes* (1 November 2011).

¹⁹¹ *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Qld) s 39(1), (3)(a).

¹⁹² *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Qld) s 39(2).

¹⁹³ *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Qld) s 39(3)(b).

OTHER MATTERS

2-18 **Are there any other matters that you wish to raise in relation to how issues about dividing fences are dealt with under the Act, or under any other Act or law?**

Chapter 3

Trees

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INTRODUCTION

3.1 Chapter 3 of the *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Qld) ('the Act') deals with trees.

3.2 The terms of reference specifically request the Commission to consider the operation and effect of section 57 of the Act (notice for particular overhanging branches); and the operation and effect of section 66(3)(b)(ii) of the Act (severe obstruction of a view), including whether it should operate retrospectively.

3.3 This Chapter of the Discussion Paper briefly discusses the common law of nuisance and abatement relating to trees. It refers to the Department of Justice and Attorney-General ('DJAG') review ('the DJAG review')¹ which led to the enactment of the Act in 2011 and summarises the key reforms about tree disputes in the Act. It provides an overview of the key provisions of Chapter 3 of the Act. It asks questions about the operation and effectiveness of some provisions of the Act and related matters arising under the terms of reference.

BACKGROUND

3.4 Prior to the commencement of the Act the options open to a person whose land was affected by a tree belonging to a neighbouring tree owner² were limited.

The common law

3.5 Generally, the common law does not restrict the type, number or location of trees planted by a property owner or occupier.

¹ See [1.1]ff.

² In this context, the term 'tree owner' does not refer to persons who might be liable in the common law tort of nuisance.

Nuisance

3.6 If a person suffers damage to or interference with the enjoyment of their land as a result of a neighbour's tree, and the damage or interference is substantial and unreasonable, that person has a right of action in the tort of nuisance. Damage is the gist of the action for damages for the tort of nuisance. So damage must occur before the cause of action is complete.³

3.7 The law of nuisance provides for a balance between the right of an occupier to use their land as they see fit and the right of a neighbour to enjoy their land without interference.⁴

3.8 The principal remedies a court can grant are:

- an injunction against permitting a nuisance to continue including a mandatory injunction (for example, by cutting down the tree or branches, or removing the roots); and
- damages to compensate for the nuisance.

3.9 The common law does not generally recognise a neighbour's right to sunlight unless it is protected by an easement.⁵

3.10 A neighbour with a view is also not protected by the law of nuisance from interference with that view by a tree owner's tree.⁶

Abatement

3.11 At common law, a person may also exercise the self-help remedy of abatement to abate a nuisance caused by the use of adjoining land, including the removal of tree branches⁷ or roots.⁸

3.12 The justification for abatement appears in Blackstone's Commentaries on the Laws of England, Book III:⁹

And the reason why the law allows this private and summary method of doing one's self justice is because injuries of this kind, which obstruct or annoy such things as are of daily convenience and use, require an immediate remedy and cannot wait for the slow progress of the ordinary forms of law.

³ *Barbagallo v J & F Catelan* [1986] 1 Qd R 245.

⁴ *Sedleigh-Denfield v O'Callaghan* [1940] AC 880 at 903.

⁵ RA Buckley, *The Law of Nuisance* (Butterworths, 2nd ed, 1996) 34–37. See *Colls v Home and Colonial Stores Ltd* [1904] AC 179, particularly Lord Lindley 212–213. See also: A Bradbrook, *Solar Energy and the Law* (Law Book Company, 1984) 92–94, 96; A Stickley, *Australian Torts Law*, (3rd ed, 2013) 608.

⁶ RP Balkin and JLR Davis, *Law of Torts* (Butterworths, 5th ed, 2013) 490–92. See *Aldred's Case* (1610) 9 Co Rep 57b.

⁷ *Lemmon v Webb* [1895] AC 1.

⁸ *Young v Wheeler* (1987) Aust Tort Reports 80-126.

⁹ W Blackstone, *Commentaries on the Laws of England, Book III*, (Cadell and Davies, 15th ed, 1809) 6.

3.13 Generally, a neighbour is not able to recover the costs of abatement from the owner of the tree.¹⁰ An exception exists where damage has occurred and it can be demonstrated that the abatement constituted a reasonable step taken in mitigation of damages.¹¹ Generally, a person is not permitted to enter a tree owner's land to effect abatement or to cause any damage to the tree owner's land or property. There are some exceptions where notice is given to remove the nuisance or there is such immediate danger to life or health as to render it unsafe to wait.¹²

The DJAG review of neighbourhood relations

3.14 As noted in Chapter 1, the development of the Act followed an extensive review by DJAG.¹³ The DJAG review found, among other things, that the application of the common law of nuisance to a neighbourhood dispute about trees did not provide a realistic solution for people living in closely settled communities in Queensland.¹⁴

3.15 The review found that there was general uncertainty in the community about whether there was an obligation to return any cut or removed parts of the tree to the owner of the tree.¹⁵

3.16 The majority of the community submissions to the DJAG review said that the owner of the tree should be responsible for lopping and maintenance of the tree.¹⁶

Key reforms in the Act resulting from the DJAG review

3.17 The Act altered the common law by introducing provisions aimed at clarifying and adding to the rights and responsibilities of an adjoining owner or occupier in relation to trees.¹⁷ Some of the key changes are:

- a 'tree-keeper'¹⁸ is responsible for trees growing on the tree-keeper's land;¹⁹

¹⁰ *Young v Wheeler* (1987) Aust Tort Reports 80–126; *Richmond City Council v Scantelbury* [1991] 2 VR 38, 48.

¹¹ *Proprietors of Strata Plan No 14198 v Cowell* (1989) 24 NSWLR 478, 487.

¹² See *Traian v Ware* [1957] VR 200, 207.

¹³ Queensland, *Parliamentary Debates*, Legislative Assembly, 2 August 2011, 2290 (PT Lucas, Deputy Premier and Attorney-General, Minister for Local Government and Special Minister for State).

¹⁴ Explanatory Notes, Neighbourhood Disputes Resolution Bill 2010 (Qld) 2.

¹⁵ Explanatory Notes, Neighbourhood Disputes Resolution Bill 2010 (Qld) 4.

¹⁶ Queensland, *Parliamentary Debates*, Legislative Assembly, 2 August 2011, 2307 (PT Lucas, Deputy Premier and Attorney-General, Minister for Local Government and Special Minister for State).

¹⁷ Explanatory Notes, Neighbourhood Disputes Resolution Bill 2010 (Qld) 3–4, 28–29; Queensland, *Parliamentary Debates*, Legislative Assembly, 25 November 2010, 4372 (CR Dick, Attorney-General and Minister for Industrial Relations).

¹⁸ See Queensland, *Parliamentary Debates*, Legislative Assembly, 25 November 2010, 4372 (CR Dick, Attorney-General and Minister for Industrial Relations) which state that 'a tree owner, [is] known as the 'tree keeper' in the [Bill]'.¹⁹

- the requirement to return to the ‘tree-keeper’ any branches, roots or fruits obtained through abatement was removed;²⁰
- a formal notice process to require removal of overhanging branches by a ‘tree-keeper’ was created;²¹
- a simplified remedy by which the Queensland Civil and Administrative Tribunal (QCAT) can make orders in relation to tree disputes under the Act was introduced;²²
- QCAT is required to keep a register of the orders it makes in relation to trees;²³
- the scope of actionable ‘interference’ by trees was expanded to include severe obstruction of light or views in certain circumstances;²⁴
- the primary consideration in relation to land affected by a tree is the safety of any person,²⁵ but the importance of considering the contribution trees make to the environment is acknowledged;²⁶ and
- a seller of land affected by an application or order of QCAT concerning a tree is required to give the buyer a copy of the application or order before entering into a contract of sale, and if the seller fails to do so then the buyer is given a right to rescind the contract before settlement in some circumstances.²⁷

OVERVIEW OF CHAPTER 3 OF THE ACT: TREES

3.18 Chapter 3 of the Act encourages a neighbour and a tree-keeper to resolve any issues informally.²⁸

3.19 Part 1 of Chapter 3 of the Act provides for the central principle that a tree-keeper is responsible for the proper care and maintenance of a tree growing on the tree-keeper’s land.

19 *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Qld) ss 48, 52(1).

20 *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Qld) s 54(2).

21 *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Qld) ch 3 pt 4. Queensland Civil and Administrative Tribunal, *Form 3 - Notice for removal of particular overhanging branches*.

22 *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Qld) s 61, ch 3 pt 5.

23 *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Qld) ss 79, 80.

24 *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Qld) ss 66(3), 75(e).

25 *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Qld) s 71.

26 *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Qld) s 73.

27 *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Qld) ch 3 pt 7.

28 *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Qld) ss 56, 60.

3.20 Part 2 provides the key definitions for Chapter 3, including the meaning of ‘tree’, ‘tree-keeper’, ‘neighbour’, and when land is ‘affected by a tree’.

3.21 Part 3 provides for the responsibilities, liabilities and rights of a tree-keeper and neighbour. A neighbour’s right to take action under the common law to abate a nuisance created by a tree is not affected by the Act,²⁹ except to the extent that a person who exercises that common law right of abatement³⁰ is not required to return the removed part of the tree to the tree-keeper.³¹ Pruning of the tree is subject to any ‘vegetation protection order’³² or other like order of the State or local government protecting the tree.³³

3.22 Part 4 deals with the removal of overhanging branches. A neighbour may either:³⁴

- exercise the common law right of abatement; or
- give notice to the tree-keeper requiring removal of overhanging branches, and if the work is not done, the neighbour (or their contractor) may remove the branches and recover costs of up to \$300 per annum from the tree-keeper.³⁵

3.23 Part 5 provides that QCAT has jurisdiction to hear and decide disputes about trees. It specifies the orders QCAT can make,³⁶ the factors QCAT must consider³⁷ (and other factors QCAT may consider)³⁸ and the consequences if a person fails to comply with a QCAT order.³⁹

3.24 Part 6 provides that QCAT is required to keep a register of orders made under Chapter 3 and sets out the procedures and mechanisms for maintaining the register so as to assist a buyer to find any orders about trees that may affect the land.

²⁹ *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Qld) s 54(1).

³⁰ To cut overhanging branches to the boundary line: *Lemmon v Webb* [1895] AC 1.

³¹ The pruning of the tree is subject to any requirements of a vegetation protection order or other like order placed by the State or local government on the tree. *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Qld) s 54(2).

³² A ‘vegetation protection order’ is an order made by a local government under a local law to provide for or facilitate the protection of a tree. (*Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Qld) sch (definition of ‘vegetation protection order’).

³³ Explanatory Notes, *Neighbourhood Disputes Resolution Bill 2010* (Qld) 4.

³⁴ *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Qld) ss 56–58.

³⁵ Consistent with Part 3 of the Act, the pruning of the tree is subject to any requirements of a vegetation protection order or other like order placed by the State or local government on the tree.

³⁶ *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Qld) ss 66–69.

³⁷ *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Qld) s 73. Section 71 of the Act states that the primary consideration is the safety of any person.

³⁸ *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Qld) ss 74–75.

³⁹ *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Qld) s 77.

3.25 Part 7 provides for a seller to disclose the existence of an application or order affecting the land in relation to a tree to a buyer, and for the consequences that flow from any disclosure or failure to make a disclosure.

3.26 Part 8 provides for an enforcement procedure that can be undertaken by a local government if the tree-keeper fails to carry out work on a tree under a QCAT order.

WHAT TREES ARE COVERED?

3.27 Chapter 3 does not apply to all trees because it does not apply to all land.⁴⁰

3.28 Chapter 3 of the Act applies to land:

- recorded in the freehold land register;⁴¹
- the subject of a lease or licence under the *Land Act 1994* (Qld);⁴²
- subject to an occupation permit or stock grazing permit under the *Forestry Act 1959* (Qld)⁴³ or subject to a stock grazing permit under the *Nature Conservation Act 1992* (Qld);⁴⁴ or
- that is a reserve, other than a reserve for community purposes, under the *Land Act 1994* (Qld).⁴⁵

3.29 Chapter 3 of the Act does not apply to:

- rural land;⁴⁶
- a parcel of land that is more than four hectares;⁴⁷
- land owned by a local government that is used as a public park;⁴⁸
- land prescribed by regulation;⁴⁹

⁴⁰ *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Qld) s 42.

⁴¹ *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Qld) s 42(1)(a). See [2.19]ff.

⁴² *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Qld) s 42(1)(b).

⁴³ *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Qld) s 42(1)(c). See [2.19]ff.

⁴⁴ *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Qld) s 42(1)(d). See [2.19]ff.

⁴⁵ *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Qld) s 42(1)(e).

⁴⁶ *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Qld) s 42(3)(a).

⁴⁷ *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Qld) s 42(3)(b).

⁴⁸ *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Qld) s 42(3)(c).

⁴⁹ *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Qld) s 42(3)(d). No relevant regulation has been made under the Act to date.

- trees planted or maintained for commercial purposes, under an order of a court or tribunal, or as a condition of a development approval;⁵⁰ or
- unallocated State land.⁵¹

3.30 A regulation may declare land,⁵² a prescribed plant,⁵³ or trees situated on land within a stated local government area⁵⁴ to be excluded from Chapter 3.

Rural land or land that is more than four hectares in area

3.31 Land is 'rural land'⁵⁵ if it is zoned rural land,⁵⁶ or declared rural land.⁵⁷ Land is also 'rural land' if more than half the land is in a zone (whatever called) that is the nearest equivalent to rural land under the Queensland planning provisions.⁵⁸

3.32 As previously noted, Chapter 3 does not apply to land that is more than four hectares in area.⁵⁹

3.33 These provisions may reflect a view that disputes about trees in larger rural blocks do not require the remedies provided for by the Act.

Land controlled by the State

3.34 Where land is held by the State as freehold land (which is four hectares or less) the State is subject to the tree obligations under the Act.⁶⁰ The remaining land

⁵⁰ *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Qld) s 42(4).

⁵¹ *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Qld) s 42(5). See [2.22]ff.

⁵² *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Qld) s 42(3)(d).

⁵³ *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Qld) s 45(3).

⁵⁴ *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Qld) s 42(2).

⁵⁵ *Land Valuation Act 2010* (Qld) s 9.

⁵⁶ *Land Valuation Act 2010* (Qld) s 10(1) (and has not ceased to be rural land under the *Land Valuation Act 2010* (Qld) s 11).

⁵⁷ *Land Valuation Act 2010* (Qld) ss 13, 14.

⁵⁸ *Land Valuation Act 2010* (Qld) s 10(2)(b). This applies where the land is under a continued Integrated Planning Act planning scheme: see *Sustainable Planning Act 2009* (Qld). See also: *Easterbrook v Janalan Pty Ltd* [2015] QCAT 81, where QCAT was required to determine whether land zoned 'Tamborine Mountain' within the 'Rural Character Precinct' was 'rural land'. Tamborine Mountain precinct does not have a rural zone. QCAT identified two relevant designations in terms of the description of 'nearest equivalent' to rural land. One was the 'Rural Character Precinct'. The other was 'Countryside'. Under the relevant planning scheme 'Development within the Rural Character Precinct is characterised by pockets of good quality agricultural land and land which exhibits high landscape and amenity values. The Precinct provides for large rural residential allotments' and 'Development within the Countryside Precinct has an agricultural character typified by broad hectare farming. Limited opportunity also exists for non-farming development – where such development maintains or enhances existing character and amenity'. The question for QCAT was whether the land zoned 'Tamborine Mountain' within the 'Rural Character Precinct' was the nearest equivalent to 'rural land'. QCAT held (at [4]) that it is not a matter for QCAT to determine whether the zone has a rural character, but rather whether it is the nearest equivalent to rural land in the particular planning scheme. QCAT ultimately held (at [8]) that the closest equivalent to a rural zone in the Tamborine Mountain zone was the 'Countryside Precinct'. On that basis, QCAT determined that the land in question was not 'rural land' for the purposes of the *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Qld).

⁵⁹ *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Qld) s 42(3)(b).

controlled by the State⁶¹ is, unless otherwise provided under the Act, generally not subject to the tree obligations under the Act.⁶²

3.35 These provisions may reflect the view that the State, (and taxpayers), should not be liable under the Act for all of the trees that adjoin and overhang the boundaries of its properties. For example, the State manages approximately 12 million hectares of national park and State forest and one million hectares of unallocated State land. These areas have about 44 000 kilometres of external boundaries. Noosa National Park alone has more than 1500 neighbouring blocks.⁶³

Liability of local governments for trees

3.36 A local government is generally exempt from the tree obligations under Chapter 3 unless it is the registered owner of freehold land⁶⁴ (and that land is four hectares or less)⁶⁵ or it is the holder of one of the defined interests in land outlined in section 48 of the Act (as a tree-keeper).

Trees growing on public parks and public footpaths

3.37 The Act specifically provides that Chapter 3 does not apply to trees situated on land owned by a local government that is used as a public park.⁶⁶

3.38 Chapter 3 does not apply to trees growing on or over public footpaths. For example, in Brisbane the Brisbane City Council (BCC) has control of all roads in the Brisbane local government area.⁶⁷ A 'road' includes a footpath.⁶⁸ The then Minister said during debate on the Neighbourhood Disputes Bill:⁶⁹

... the [Bill] does not alter the existing law concerning public footpaths and parks and, in particular, does not take away common law remedies such as abatement and remedies under nuisance, which remain available to landowners. Similarly, local authorities are given no rights under the bill to deal with problem trees emanating from private property that are causing nuisance to footpaths or parks. That is something they can deal with in terms of their local laws. ... footpaths and parks are public areas and local authorities have a

60 *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Qld) s 8(a). See also: Explanatory Notes, Neighbourhood Disputes Resolution Bill 2010 (Qld) 12.

61 See [2.26]ff.

62 Explanatory Notes, Neighbourhood Disputes Resolution Bill 2010 (Qld) 12.

63 Information provided by the then Department of National Parks, Recreation, Sport and Racing (now the Department of National Parks, Sport and Racing), 11 December 2014.

64 *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Qld) s 42(1)(a).

65 *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Qld) s 42(3)(b).

66 *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Qld) s 42(3)(c).

67 *Local Government Act 2009* (Qld) s 60(1).

68 *Local Government Act 2009* (Qld) s 59(2)(c).

69 Queensland, *Parliamentary Debates*, Legislative Assembly, 2 August 2011, 2292 (PT Lucas, Deputy Premier and Attorney-General, Minister for Local Government and Special Minister for State).

duty of care to all members of the public, and specifically with regards to negligence, to ensure the public are not harmed by trees growing in public access areas. It is up to local councils to introduce local laws and policies to deal with those issues...

3.39 The BCC and other local governments have enacted local laws to deal with trees on footpaths and on other local government controlled land.⁷⁰

Brisbane City Council

3.40 The Brisbane City Council *Natural Assets Local Law 2003* ('NALL')⁷¹ governs trees (and other vegetation) on land or premises owned, controlled or occupied by the BCC.⁷²

3.41 Section 7 of NALL prohibits a range of specific activities (that are not exempt under Part 7 of NALL) in respect of 'protected vegetation':⁷³

7 Restriction on interference with protected vegetation

(1) A person must not interfere with, or cause or permit interference with a tree on the footpath of any Council controlled road unless—

- (a) the tree is on a footpath abutting the boundary of premises owned or occupied by the person; and
- (b) the interference is strictly in accordance with a permit issued by Council.

...

(2) A person must not otherwise interfere with, or cause or permit interference with a street tree or garden, or trees, gardens, or other vegetation in any park or other land or premises owned or occupied by Council.

...

(3) A person must not, unless strictly in accordance with a permit issued by Council, interfere with, or cause or permit interference with—

- (a) any other protected tree;

...

- (b) any protected vegetation other than trees.

⁷⁰ See [3.40]ff.

⁷¹ Local laws can be downloaded from the State government's Local Laws Database at <http://www.dilgp.qld.gov.au/local-government/laws/local-laws-online-database.html>.

⁷² Significant amendments to the NALL, which included permits for street tree pruning, commenced on 27 January 2014.

⁷³ Brisbane City Council, *Natural Assets Local Law 2003* s 7(1)–(3). The maximum penalty for each of those offences is: 50 penalty units where the replacement value of the tree is \$4 000 or less; otherwise 500 penalty units where the offender is an individual, or 850 penalty units where the offender is a corporation. The prescribed value of a penalty unit for a local law made by the Brisbane City Council is \$113.85: *Penalties and Sentences Act 1992* (Qld) ss 5(1)(c), 5A(1); *Penalties and Sentences Regulation 2005* (Qld) s 2B. As from 1 July 2015, the prescribed value of a penalty unit will be \$117.80: *Penalties and Sentences Amendment Regulation (No. 1) 2015* (Qld) ss 2, 4.

3.42 Property owners and occupiers can apply to the BCC for a permit⁷⁴ to undertake routine maintenance of ‘street trees’ directly in front of, or adjacent to, their property.⁷⁵ For example, residents may trim ‘street tree’ branches that are overhanging footpaths, front fences, letter boxes or driveways.⁷⁶

3.43 All other pruning work (including park trees) must be carried out by the BCC.⁷⁷

Other local governments

3.44 A number of other local governments have enacted local laws that deal with a range of issues including one or more of the following:

- dangerous vegetation;⁷⁸
- vegetation protection;⁷⁹ and
- intrusive (including overhanging) vegetation.⁸⁰

- 3-1 Does the Act appropriately deal with trees on different types of land across Queensland?**
- 3-2 Should there be any changes to the current exemptions in respect of the State and/or local governments?**

⁷⁴ Brisbane City Council, *Natural Assets Local Law 2003* s7(1)(b), pt 3.

⁷⁵ See: <<http://www.brisbane.qld.gov.au/laws-permits/laws-permits-residents/protected-vegetation/apply-permit-work-protected-vegetation>>; Brisbane City Council, Factsheet, *Natural Assets Local Law Minor Street Tree Pruning*, [Publication N2014-03251] 2.

⁷⁶ Ibid 1.

⁷⁷ Ibid.

⁷⁸ See for example: *Balonne Shire Council Local Law No 18* (Control of Nuisances) s 15; *Bulloo Shire Council (Control of Nuisances) Local Law No 18* s 15; *Carpentaria Shire Council Local Law No 14* (Control of Nuisances) s 15; *Croydon Shire Council Local Law No 3* (Control of Nuisances) s 15; *Ipswich City Council Local Law No 49* (Vegetation Management); *Ipswich City Council Local Law Policy No 49A* (Permitted Damage); and *Ipswich City Council Local Law Policy No 49B* (Management Policies); *Logan City Council Subordinate Local Law No 10.1* (Public Health) 1999 s 9; *Mornington Shire Council Local Law No 4* (Control of Nuisances) s 15; *Yarrabah Aboriginal Shire Council By-Law No 4* (Control of Nuisances) ss 5.3–5.4; and *Yarrabah Aboriginal Shire Council By-Law No 1* (Administration) s 4.5.

⁷⁹ See for example: *Bulloo Shire Council (Protection of Vegetation) Local Law No 2*; *Bulloo Shire Council Local Law Policy No 2* (Protection of Vegetation) s 5; *Doomadgee Aboriginal Shire Council By-Laws* ch 27 (Preservation of Trees); *Gold Coast City Council Local Law No 8* (Public Health, Safety and Amenities) 2008 s 6(d)–(g), (u), (w), (ad); *Gold Coast City Council Subordinate Local Law No 8.1* (Public Health, Safety and Amenities) 2008 s 5; and *Gold Coast City Council Local Law No 6* (Vegetation Management); *Ipswich City Council Local Law No 49* (Vegetation Management); *Ipswich City Council Local Law Policy No 49B* (Management Policies); *Pormpuraaw Aboriginal Council By-Laws* pt 5 (Town Planning) div 9 ss 5.56–5.58, div 12 s 5.66; *Redland City Council Local Law No 6* (Protection of Vegetation).

⁸⁰ See for example: *Balonne Shire Council Local Law No 18* (Control of Nuisances) s 16; *Bulloo Shire Council (Control of Nuisances) Local Law No 18* s 16; *Carpentaria Shire Council Local Law No 14* (Control of Nuisances) s 16; *Croydon Shire Council Local Law No 3* (Control of Nuisances) s 16; *Flinders Shire Council Local Law No 13* (Control of Nuisances) s 16; *Mornington Shire Council Local Law No 4* (Control of Nuisances) s 16.

Operation of the Act in relation to other Acts and other laws

3.45 The Act does not override other laws.⁸¹ For example, trees of particular cultural heritage significance are protected under the *Queensland Heritage Act 1992* (Qld) and listed in the Queensland Heritage Register.⁸² A neighbour can check if a tree is protected by searching the Queensland Heritage Register⁸³ or contacting the relevant local government.⁸⁴

3.46 Local governments can also protect trees under local laws through a 'vegetation protection order'.⁸⁵

3.47 QCAT cannot make an order for a person to carry out work on a tree that is prohibited under another Act.⁸⁶

3.48 If QCAT is satisfied there is a genuine dispute, it may order a person to carry out work on a tree even though the work is restricted or prohibited under a local law, or consent is withheld by a local government or a tree-keeper under a 'vegetation protection order' or other similar order protecting the tree.⁸⁷

3.49 In summary, if a person is required under Chapter 3 to carry out work in relation to a tree (other than under a QCAT order), and another law requires a consent or authorisation to be given before the work may be carried out, the person must not carry out the work until the person obtains the consent or authorisation.⁸⁸

KEY DEFINITIONS OF CHAPTER 3

What is a 'tree'?

3.50 A 'tree' is defined to include any plant that resembles a tree in form and size. It includes all woody perennial plants, palms, cactus or vines and includes a dead tree or rooted stump.⁸⁹

⁸¹ *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Qld) ss 5, 43, 67.

⁸² The Queensland Heritage Register is a list of places that have cultural heritage significance to Queensland.

⁸³ See <<http://www.qld.gov.au/environment/land/heritage/register/>>.

⁸⁴ See <<http://www.dlqp.qld.gov.au/local-government-directory>>.

⁸⁵ A 'vegetation protection order' is defined as an order made by a local government under a local law to provide for or facilitate the protection of a tree: *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Qld) sch (definition of 'vegetation protection order').

⁸⁶ *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Qld) s 67(3).

⁸⁷ *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Qld) s 67(1).

⁸⁸ *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Qld) s 43. See Explanatory Notes, *Neighbourhood Disputes Resolution Bill 2010* (Qld) 26.

⁸⁹ *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Qld) s 45.

Who is a ‘tree-keeper’?

3.51 The Act deploys the term ‘tree-keeper’⁹⁰ which is central to the operation of Chapter 3. A ‘tree-keeper’ is generally the registered owner of freehold land,⁹¹ the lessee or licensee of land,⁹² or the body corporate⁹³ of common property land upon which the tree is, or was previously, wholly or mainly situated.⁹⁴

3.52 A tenant of freehold land is not a ‘tree-keeper’.

Who is a ‘neighbour’?

3.53 The Act also deploys the term ‘neighbour’ for the operation of Chapter 3. A ‘neighbour’ is generally the registered owner or occupier of freehold land affected by the tree,⁹⁵ except that an occupier is not a neighbour for the purpose of removal of overhanging branches under Part 4 of Chapter 3.⁹⁶ For that Part, the ‘neighbour’ is the landlord.⁹⁷

When is land ‘affected by a tree’?

3.54 Land is ‘affected by a tree’ at a particular time if:⁹⁸

- (a) any of the following applies:
 - (i) branches from the tree overhang the land;
 - (ii) the tree has caused, is causing, or is likely within the next 12 months to cause:
 - (A) serious injury to a person on the land; or

⁹⁰ *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Qld) s 48.

⁹¹ *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Qld) s 48(1)(a). The registered owner of the land can be ascertained by undertaking a title search under the *Land Title Act 1994* (Qld).

⁹² *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Qld) s 48(1)(b) – where the land is subject to a lease or licence respectively under the *Land Act 1994* (Qld).

⁹³ *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Qld) s 48(1)(e), (f). The Explanatory Notes for Amendments, *Neighbourhood Disputes Resolution Bill 2010* (Qld) 2, make it clear that ‘this sub-section only captures the owners of the common property (in the scheme under the *Body Corporate and Community Management Act 1997* (Qld) or in the plan under the *Building Units and Group Titles Act 1980* (Qld)). The registered owners of individual lots in the scheme under the *Body Corporate and Community Management Act 1997* (Qld) or in the plan under the *Building Units and Group Titles Act 1980* (Qld) are included in s 48(1)(a) of the Act.

⁹⁴ *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Qld) s 47.

⁹⁵ *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Qld) s 49(1).

⁹⁶ *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Qld) s 49(2), pt 4.

⁹⁷ The tenant may ask the landlord to attempt to resolve the dispute with the neighbour or issue a Notice for removal of particular overhanging branches. If the landlord (registered owner of the land) refuses to issue the Notice, the tenant can apply to QCAT using Queensland Civil and Administrative Tribunal, *Form 51 – Application for a tree dispute*.

⁹⁸ *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Qld) s 46.

- (B) serious damage to the land or any property on the land; or
 - (C) substantial, ongoing and unreasonable interference with the neighbour's use and enjoyment of the land; and
- (b) the land:
- (i) adjoins the land on which the tree is situated; or
 - (ii) would adjoin the land on which the tree is situated if it were not separated by a road.

3-3 Should the definition of land 'affected by a tree' in section 46 of the Act be changed in any way?

RESPONSIBILITIES, LIABILITIES AND RIGHTS

Responsibilities of a tree-keeper

3.55 Under section 52 of the Act a tree-keeper is responsible for the proper care and maintenance of a tree growing on their land. More specifically, a tree-keeper is responsible for cutting and removing any branches of a tree which overhang a neighbour's land.⁹⁹

3.56 A tree-keeper is also responsible for ensuring that their trees do not, or are not likely within the next 12 months, to cause serious injury to any person, serious damage to any person's land or property or substantial, ongoing and unreasonable interference with a neighbour's use and enjoyment of their land.¹⁰⁰

3.57 Some guidance was provided by the Explanatory Notes to the Bill as follows:¹⁰¹

Normal tree litter such as leaves, flowers, fruit, seeds or small elements of deadwood would normally not provide the basis for ordering removal of or intervention with a tree. However, there may be cases where substantial and ongoing accumulation of tree litter may be found to be unreasonable by QCAT. For example, fine leaves from particular species of trees that intrude through mesh in gutters and water tanks may be shown to regularly block the gutters or spoil the tank water for drinking purposes.

3.58 Non-compliance with the obligations imposed by section 52 does not, in itself, create a civil cause of action.¹⁰²

⁹⁹ *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Qld) s 52(1).

¹⁰⁰ *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Qld) ss 46, 52(2).

¹⁰¹ Explanatory Notes, *Neighbourhood Disputes Resolution Bill 2010* (Qld) 32.

3.59 When the Act was being developed some concerns were raised that tree-keepers would remove trees rather than face ongoing trimming costs and sharing the cost of obtaining a report (which QCAT might order) from a qualified arborist, and that this would affect the amenity of the neighbourhood.¹⁰³

OPTIONS FOR RESOLVING TREE DISPUTES WITH A NEIGHBOUR

3.60 If a neighbour's land is affected by a tree, depending on the nature of the issue, the Chapter generally provides for four ways in which the neighbour may deal with the issue.¹⁰⁴ The options are to:

- resolve the issue informally with the tree-keeper;¹⁰⁵
- take action to abate the nuisance¹⁰⁶ by cutting the branches (and/or roots) back to the common boundary;
- engage the Act's remedies by issuing a notice to the tree-keeper to remove overhanging branches¹⁰⁷ (only for branches that extend at least 50cm over the boundary and 2.5m or less above the ground); and
- apply to QCAT for an order about the tree or trees.¹⁰⁸

Resolve the issue informally with the neighbour

3.61 The Act encourages the neighbour and the tree-keeper to resolve any issue about the tree informally.¹⁰⁹

3.62 If they are not able to resolve the issue informally, they may seek the assistance of a mediator or another alternative dispute resolution process. There are Dispute Resolution Centres throughout Queensland¹¹⁰ offering free

¹⁰² *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Qld) s 52(3). The notes to the section state that it does not create a separate cause of action.

¹⁰³ Deputy Premier and Attorney-General, Minister for Local Government and Special Minister of State, 'Neighbourhood Disputes Resolution Bill 2010: Results of Consultation Process' (November 2010) 14 at Department of Premier and Cabinet (Qld), *Cabinet documents* (6 August 2014) <<http://rti.cabinet.qld.gov.au/cabinet.aspx>>.

¹⁰⁴ *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Qld) s 41(2). See also ss 56, 60.

¹⁰⁵ *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Qld) ss 56(1), 60(1).

¹⁰⁶ *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Qld) s 41(2)(a). A neighbour who exercises this common law right may, but is not required to, return the removed branches to the tree-keeper: *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Qld) s 54(2).

¹⁰⁷ *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Qld) s 41(2)(b). See also: Queensland Civil and Administrative Tribunal, *Form 3 – Notice for removal of particular overhanging branches*. If the work is not done the person may remove the branches and recover the costs from the tree-keeper: *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Qld) ss 41(2)(b)(ii), 58.

¹⁰⁸ *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Qld) s 41(2)(c). See also, Queensland Civil and Administrative Tribunal, *Form 51 – Application for a tree dispute*.

¹⁰⁹ *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Qld) ss 56(1), 60(1).

¹¹⁰ The Dispute Resolution Centres are administered by the Department of Justice and Attorney-General.

mediation.¹¹¹ There is no express reference in the Act to mediation or other alternative dispute resolution processes.

3.63 Mediation is discussed in more detail in Chapter 4 of this Discussion Paper. The parties are encouraged to reach an agreement in writing, but it is not a requirement under the Act that an agreement be in writing.

Exercise the common law right of ‘abatement’ (or ‘self-help’)

3.64 The Act specifically preserves the common law right of abatement, but with one modification.

3.65 Under the common law, a property owner who abates a nuisance by trimming the branches, roots or fruit of a neighbour’s tree to the common boundary line must return the cut branches, roots and fruit to the tree-keeper.¹¹² Section 54(2) of the Act modifies the common law by providing that a neighbour is not required to return the removed part of a ‘tree’ to the tree-keeper.¹¹³ The modification may not apply to a tree to which Chapter 3 does not apply.

3.66 A neighbour may not have a clear or any understanding of the common law right of abatement.

3.67 The common law right of abatement is subject to vegetation protection orders and other orders imposed by local and State government for the protection of trees.

3-4 The Act specifically preserves the common law right of abatement in relation to a tree. Should this right be modified, and if so how?

3-5 Should a neighbour of the State or a local government have the benefit of the modification to the common law?

Notice to tree-keeper to cut overhanging branches

3.68 As an alternative to abatement, a neighbour can give a tree-keeper a written *Notice for Removal of Particular Overhanging Branches*¹¹⁴ under Part 4 of Chapter 3 of the Act, (if the overhanging branches are less than 2.5m high and extend more than 50 cm over the boundary). The notice asks the tree-keeper to cut and remove overhanging branches.¹¹⁵

¹¹¹ See: <<http://www.qld.gov.au/law/legal-mediation-and-justice-of-the-peace/setting-disputes-out-of-court/neighbourhood-mediation/>>.

¹¹² *Mills v Brooker* [1919] 1 KB 555.

¹¹³ *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Qld) s 54(2).

¹¹⁴ Using Queensland Civil and Administrative Tribunal, *Form 3 – Notice for removal of particular overhanging branches*.

¹¹⁵ *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Qld) s 57(1)–(2).

3.69 The 2.5m height restriction is a policy decision designed to allow a person to 'remove branches likely to interfere with the passage of a person or vehicle. It is also a height that would allow a tree-keeper to reach up and carry out the work themselves'.¹¹⁶

3.70 The notice must state a time at least 30 days after the day it is given by which the branches are to be cut and removed.¹¹⁷

3.71 The notice must ask the tree-keeper to give the neighbour a written notice, no later than the day before anyone enters the neighbour's land to cut and remove the branches, that states the person who will cut and remove the overhanging branches and the day when the work will be carried out.¹¹⁸

3.72 The notice must give permission to the tree-keeper or the tree-keeper's contractor to enter the neighbour's land on the day advised to cut and remove the overhanging branches. The work must be carried out at a time at least 30 days after the date the notice is given and between the hours of 8.00am and 5.00pm, or as otherwise agreed.¹¹⁹

3.73 The notice must be accompanied by at least one written quote stating the estimated cost of the work and a copy of the provisions of Part 4 of Chapter 3 of the Act.¹²⁰

3.74 The notice has a section that a tree-keeper can sign and return to indicate they will address the problem, either by cutting the branches themselves or arranging for a tree lopper to do so.¹²¹

3.75 During the consultation process for the Bill, a concern was raised that there is no limitation of liability afforded to the neighbour in relation to the tree-keeper or their contractors entering the neighbour's property. It was suggested that a provision be included that a tree-keeper or contractor enters a neighbour's land at their own risk or that a tree-keeper or contractor who enters a neighbour's land to carry out work must indemnify the neighbour against any damage or personal injury that occurs on the neighbour's land.¹²²

¹¹⁶ See Explanatory Notes for Amendments, Neighbourhood Disputes Resolution Bill 2010 (Qld) 3; Queensland, *Parliamentary Debates*, Legislative Assembly, 2 August 2011, 2293 (PT Lucas, Deputy Premier and Attorney-General, Minister for Local Government and Special Minister for State).

¹¹⁷ *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Qld) s 57(3)(a).

¹¹⁸ *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Qld) s 57(3)(b).

¹¹⁹ *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Qld) s 57(3)(c). Note that under s 57(4), permission under s 57(3)(c) of the Act does not authorise the person to enter a dwelling on the neighbour's land.

¹²⁰ *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Qld) s 57(3)(d).

¹²¹ Queensland Civil and Administrative Tribunal, *Form 3 – Notice for removal of particular overhanging branches*.

¹²² Deputy Premier and Attorney-General, Minister for Local Government and Special Minister of State, 'Neighbourhood Disputes Resolution Bill 2010: Results of Consultation Process' (November 2010) 14 at Department of Premier and Cabinet (Qld), *Cabinet documents* (6 August 2014) <<http://rti.cabinet.qld.gov.au/cabinet.aspx>>.

3.76 The notes to section 57(3)(c) of the Act state that:

- it is the neighbour's responsibility to consider public liability insurance before giving a person permission to enter the neighbour's land; and
- it is the tree-keeper's responsibility to consider a contractor's insurance before engaging a contractor to carry out work on a tree.

3.77 These matters are also stated in the notes at the end of the notice.¹²³

3-6 Should the Act expressly deal with questions of liability arising from a person going onto a neighbour's land pursuant to a notice under section 57 of the Act?

3.78 If the tree-keeper does not respond to the notice within 30 days (or the time specified in the notice), the neighbour may cut and remove (or engage someone else to cut and remove) the overhanging branches.¹²⁴ This does not authorise entry to the tree-keeper's land.¹²⁵

3.79 The tree-keeper is liable for the reasonable expenses incurred by the neighbour in cutting and removing the overhanging branches, up to a maximum of \$300.¹²⁶

3.80 If the contribution (up to \$300) sought by the neighbour from the 'tree-keeper' is not paid by the tree-keeper, the debt, with or without interest, may be recovered as a debt in minor civil dispute proceedings through QCAT.¹²⁷

3.81 If the costs of trimming the tree are likely to be significant, a neighbour can elect to seek an order from QCAT, requiring the tree-keeper to be responsible for the proper and reasonable costs of maintaining their tree.¹²⁸

3.82 The rights of a neighbour who gives a notice under section 57 and a tree-keeper who acts in accordance with the notice are subject to vegetation protection

¹²³ The notice (Queensland Civil and Administrative Tribunal, *Form 3 – Notice for removal of particular overhanging branches*) does not refer to other matters including: (a) the section 57 notice provision is subject to vegetation protection orders – and cannot be used if the local government has not given consent; and (b) the neighbour cannot use this notice procedure if the neighbour has given a notice within the previous 12 months (for any tree) to the tree-keeper.

¹²⁴ *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Qld) s 58(1)–(2).

¹²⁵ *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Qld) s 58(3).

¹²⁶ *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Qld) s 58(4). A neighbour cannot claim for their own labour to undertake the work: Queensland, *Parliamentary Debates*, Legislative Assembly, 2 August 2011, 2308 (PT Lucas, Deputy Premier and Attorney-General, Minister for Local Government and Special Minister of State).

¹²⁷ *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Qld) s 58(5). The relevant application form to complete is Queensland Civil and Administrative Tribunal, *Form 3 (version 4) – Application for minor civil dispute – minor debt*. The application must include a copy of all relevant documents, such as receipts for the expenses incurred.

¹²⁸ *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Qld) s 66(5)(a).

orders or other similar orders placed by the State or a local government on a tree.¹²⁹

3.83 A neighbour cannot use this notice procedure if the neighbour has given a notice within the previous 12 months (for any tree) to the tree-keeper.¹³⁰

3.84 Feedback received during consultation on the draft legislation supported the proposal that a tree-keeper should be responsible for the maintenance of trees growing on their land¹³¹ (including the cost of trimming, lopping and removing overhanging branches).¹³² As the then Attorney-General explained during debate on the Bill that became the Act, some neighbours may not be able to trim the tree themselves.¹³³

This amendment [section 58(4) and (5) of the Act] was actually introduced as a result of consultation in relation to the bill. Many neighbours wanted to have the ability to resolve an overhanging tree issue expeditiously but they were not in a position where they could do it themselves.... Overhanging branches give the greatest concern, frankly, to pensioners and people who are often frail or infirm or the very fact of seeking to remove them, even if they are low-hanging ones such as provided for under this provision, could in fact cause them some damage or injury or stress. ... This was an attempt to give them some certainty to quantify what they might be able to ask for in their circumstances. In fact, if anything, \$300 would represent an amount that may in some circumstances not be sufficient to deal with it. But at least it gives them the ability to have some understanding that a contribution would be made.

- | | |
|------|---|
| 3-7 | Are the height and depth triggers for the notice appropriate? |
| 3-8 | Is the prescribed maximum contribution of \$300 appropriate? |
| 3-9 | Is the prescribed frequency restricting a neighbour to issue only one notice to the 'tree-keeper' per year appropriate? |
| 3-10 | Is the procedure under Part 4 of Chapter 3 appropriate to give effect to the rights and responsibilities of the 'tree-keeper' under section 52 of the Act? |

¹²⁹ Explanatory Notes, Neighbourhood Disputes Resolution Bill 2010 (Qld) 4.

¹³⁰ *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Qld) s 57(5)(a). A notice cannot be given to anyone else who is also a 'tree-keeper' for the tree with the overhanging branches. See *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Qld) s 57(5)(b).

¹³¹ Deputy Premier and Attorney-General, Minister for Local Government and Special Minister of State, 'Neighbourhood Disputes Resolution Bill 2010: Results of Consultation Process' (November 2010) 14 at Department of Premier and Cabinet (Qld), *Cabinet documents* (6 August 2014) <<http://rti.cabinet.qld.gov.au/cabinet.aspx>>.

¹³² Queensland, *Parliamentary Debates*, Legislative Assembly, 2 August 2011, 2307 (PT Lucas, Deputy Premier and Attorney-General, Minister for Local Government and Special Minister of State).

¹³³ Ibid.

BRINGING AN APPLICATION TO QCAT

Jurisdiction of QCAT - what issues can QCAT determine?

3.85 QCAT will be discussed in more detail in Chapter 4 of the Discussion Paper.

3.86 Part 5 of Chapter 3 of the Act provides for a neighbour to make an application to QCAT and for QCAT's power to make orders about trees, which are discussed below.

3.87 Part 5 of Chapter 3 gives QCAT jurisdiction to hear and decide any matter¹³⁴ in relation to a tree in which it is alleged that land is affected by a tree.¹³⁵ To the extent that the issue arises because branches from the tree overhang the land, it is required that the branches extend at least 50 cm from the common boundary and that issue cannot be resolved using the Notice process in Part 4 of Chapter 3.¹³⁶

3.88 An occupier who is not a registered owner of freehold land can only bring an application if the owner of the land has refused to bring the application.¹³⁷

3.89 The Act encourages the tree-keeper and neighbour to resolve the issue informally.¹³⁸

3.90 The examples detailed in section 59 of the Act outline three situations where a neighbour can apply to QCAT.

The neighbour's land is affected by a tree other than because branches from the tree overhang the land.

Branches from a tree overhang the neighbour's land and the neighbour is seeking a remedy that is more than the cutting and removal of the branches.

The neighbour is seeking the cutting and removal of branches overhanging the neighbour's land that are more than 2.5m above the ground.

¹³⁴ *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Qld) s 61.

¹³⁵ *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Qld) s 61. The application is made under the *Queensland Civil and Administrative Tribunal Act 2009* (Qld) s 33.

¹³⁶ *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Qld) s 65(c).

¹³⁷ *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Qld) s 62(2).

¹³⁸ *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Qld) s 60(1).

3.91 The Explanatory Notes to the Bill provide further examples:¹³⁹

- the roots of the tree might be causing damage to the neighbour's driveway or blocking underground pipes on the neighbour's property;
- the tree might have grown to such height or thickness that it is blocking light to the windows or roof of a neighbour's property; and
- the tree might be poisoning a water supply, by the dropping of leaves into a water tank.

3-11 Should QCAT's jurisdiction in relation to trees be changed?

Neighbour required to give a copy of the QCAT application to the tree-keeper

3.92 At least 21 days before the date when a QCAT application is to be heard, the neighbour must give a copy of the application to the tree-keeper, any relevant authority that would be entitled to appear in proceedings in relation to the tree¹⁴⁰ and any other person, including for example an occupier of the tree-keeper's land, that the neighbour has reason to believe would be affected by the order.¹⁴¹

3.93 QCAT may waive the requirement to give a copy of the application, or may vary the minimum period before the hearing of the application by which the application must be served, if it considers it appropriate in the circumstances so that the application can be dealt with in a timely manner. For example, this power allows QCAT to expedite an application where a tree poses an imminent threat of serious injury to a person or serious damage to the neighbour's land or any property on the neighbour's land.¹⁴²

Requirements before QCAT can make an order

3.94 QCAT may only make an order under section 66 of the Act if it is satisfied that:¹⁴³

- the neighbour has taken all reasonable steps to reach agreement with the tree-keeper;¹⁴⁴

¹³⁹ Explanatory Notes, Neighbourhood Disputes Resolution Bill 2010 (Qld) 32.

¹⁴⁰ *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Qld) s 64: where government consent or authorisation may be required.

¹⁴¹ *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Qld) s 63(1)(a)–(c).

¹⁴² *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Qld) s 63(2).

¹⁴³ *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Qld) s 65.

¹⁴⁴ *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Qld) s 65(a).

- the neighbour has made a reasonable effort to resolve the dispute under any relevant local law, local government scheme or local government administrative process;¹⁴⁵ and
- the application has been given to all appropriate persons or entities (except to the extent that a requirement under that section has been waived by QCAT).¹⁴⁶

3.95 If there is an alternative 'local government administrative process' available for resolution of a dispute about a tree, then that process must be undertaken before an application is made to QCAT.¹⁴⁷ For example, if a local government has local laws that would allow concerns about an alleged dangerous tree to be addressed, then the process under the local law should be used first to try to resolve the issue.¹⁴⁸

Mediation and compulsory conference

3.96 QCAT will refer parties to mediation or compulsory conference in appropriate cases, which may include disputes about trees.¹⁴⁹

3.97 Mediation and compulsory conference are discussed in more detail in Chapter 4 of this Discussion Paper.

What orders can QCAT make?

3.98 QCAT may make a wide variety of orders about trees. Under section 66 of the Act, QCAT can make any order it considers appropriate in relation to a tree to:¹⁵⁰

- prevent serious injury to any person;¹⁵¹
- remedy, restrain or prevent serious damage to the neighbouring landowner's land or property on the land;¹⁵² and
- remedy, restrain or prevent substantial, ongoing and unreasonable¹⁵³ interference¹⁵⁴ with the use and enjoyment of the neighbour's land.¹⁵⁵

¹⁴⁵ *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Qld) s 65(b). The relevant local government may have a scheme for dealing with 'nuisance' trees.

¹⁴⁶ *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Qld) s 65(d).

¹⁴⁷ See *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Qld) s 65(b).

¹⁴⁸ For example, some local governments provide ratepayers with access to a council service to inspect trees on private property and prune them.

¹⁴⁹ QCAT's website contains fact sheets about mediation in these matters: see <<http://www.qcat.qld.gov.au/going-to-the-tribunal/types-of-proceedings/mediation>>.

¹⁵⁰ *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Qld) s 66(2).

¹⁵¹ *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Qld) s 66(2)(a).

¹⁵² *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Qld) s 66(2)(b)(i).

Severe obstruction of a view

3.99 As noted above, the common law of nuisance does not provide a remedy where trees block out a neighbour's view.

3.100 Also, section 178 of the *Property Law Act 1974* (Qld) provides:

178 No presumption of right to access or use of light or air

From and after 1 March 1907, no right to the access or use of light or air to or for any building shall be deemed to exist, or to be capable of coming into existence, merely because of the enjoyment of such access or use for any period or of any presumption of lost grant based upon such enjoyment.

3.101 The Act modified the common law to enable a neighbour to apply to QCAT for an order to remedy, restrain or prevent 'substantial, ongoing and unreasonable interference with the use and enjoyment of (neighbouring) land', including severe obstruction of a view.¹⁵⁶

3.102 Section 66 of the Act specifically overrides section 178 of the *Property Law Act 1974* (Qld) by providing¹⁵⁷ that despite section 178 of the *Property Law Act*, QCAT may make an order under subsections (2)(b) and (3) of section 66 of the Act, that is intended to result in the access of light to land.¹⁵⁸

3.103 There are a number of limitations to the operation of section 66(3) of the Act about obstruction of a view. The trees or their foliage obstructing the view must be 'at least 2.5m above the ground',¹⁵⁹ it must be a 'severe obstruction'¹⁶⁰ of a view, the view must be 'from a dwelling' on the neighbour's land, and that view must have 'existed when the neighbour took possession of the land'.¹⁶¹

¹⁵³ See *Rice v Livingstone* [2014] QCAT 345 where QCAT found that the 'tree-keeper's actions in simply allowing their trees (many of which had been planted before they purchased the property) to grow was not of itself 'unreasonable'. However, QCAT found that allowing a Bauhinia tree to grow to 11 metres at a distance of one metre from the neighbour's boundary was not reasonable. Nor was allowing 3 camphor laurels to grow to 18 to 22 metres and constitute a substantial, ongoing interference with the use and enjoyment of the neighbour's land, which was an unreasonable interference.

¹⁵⁴ For interference that is an obstruction of sunlight or a view see *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Qld) s 66(3).

¹⁵⁵ *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Qld) s 66(2)(b)(ii).

¹⁵⁶ *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Qld) s 46(a)(ii)(C) (definition of land 'affected by a tree'), ss 66(2)(b)(ii), 66(3)(b)(ii).

¹⁵⁷ *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Qld) s 66(4).

¹⁵⁸ See also: Explanatory Notes, *Neighbourhood Disputes Resolution Bill 2010* (Qld) 34.

¹⁵⁹ *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Qld) s 66(3)(b).

¹⁶⁰ See the discussion below at [3.110]–[3.117].

¹⁶¹ *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Qld) s 66(3)(b)(ii).

3.104 The Act does not create a right to a view. QCAT has described the nature of the remedy as ‘a statutory one which is discretionary, and will not be exercised if it is not appropriate in the circumstances’.¹⁶²

3.105 In *Laing & Anor v Kokkinos & Anor (No 2)*¹⁶³ QCAT outlined the three step process under the Act which QCAT must follow when determining applications for orders under s 66(3)(b)(ii) of the Act:¹⁶⁴

First, the Tribunal must consider what view existed when the applicant took possession of the property. Secondly, the Tribunal must determine whether the trees on the adjoining property are causing a severe obstruction of that view. Then, if they are, the third step requires the Tribunal to balance the interests of the parties considering the matters listed in Chapter 3, Part 5, Division 4 of the Act, namely, ss 72, 73 and 75.

3.106 When deciding an application for an order under section 66 QCAT must consider the general matters listed in section 73 of the Act, and the principle that the removal or destruction of living trees should be avoided, ‘unless the issue... can not otherwise be satisfactorily resolved.’ Alternatives to removal must, if appropriate, be considered: for instance, pruning.¹⁶⁵

3.107 The severe obstruction of a view was considered by QCAT in *Mahoney v Corrin*.¹⁶⁶ QCAT was asked to determine, as a question of law¹⁶⁷ whether section 66 of the Act conferred jurisdiction upon QCAT to protect a view that was lost prior to the commencement of the Act.¹⁶⁸ In that case, the neighbours had purchased their property in the early 1980s. The tree-keeper purchased her property in 2001.

3.108 QCAT held that section 66 of the Act was not retrospective in character.

3.109 QCAT held that it ‘did have jurisdiction to hear and decide an application in relation to a view that existed prior to 1 November 2011 (i.e. the commencement of the [Act]) but did not exist after the commencement of that Act’. However QCAT emphasised that: ‘[It] is not the purpose or intent of the [Act] to provide an applicant with greater or better views than those which existed at the time of purchase’.¹⁶⁹

¹⁶² *Laing & Anor v Kokkinos & Anor (No 2)* [2013] QCATA 247 [32].

¹⁶³ [2013] QCATA 247.

¹⁶⁴ *Ibid* [34].

¹⁶⁵ *Ibid* [7]. See also: Explanatory Notes, Neighbourhood Disputes Resolution Bill 2010 (Qld) 36.

¹⁶⁶ [2013] QCAT 318.

¹⁶⁷ See *Queensland Civil and Administrative Tribunal Act 2009* (Qld) s 117.

¹⁶⁸ *Mahoney v Corrin* [2013] QCAT 318 [12]–[13].

¹⁶⁹ *Ibid* [10].

- 3-12 Should section 66(3)(b)(ii) of the Act be changed to limit its operation to a view that existed at or after the commencement of the Act (i.e 1 November 2011)?**
- 3-13 Should section 66(3)(b)(ii) of the Act be changed to limit its operation to, for a particular owner, a view that existed when that person became an owner?**
- 3-14 Should section 66(3)(b)(ii) of the Act be changed to limit its operation to a view that existed no longer than five years, or some other period, before the application is made?**

What is a ‘severe obstruction’?

3.110 The term ‘severe obstruction’ is not defined in either the Act or in the Explanatory Notes to the Neighbourhood Disputes Resolution Bill 2010. However, in the Second Reading speech of the *Neighbourhood Disputes Resolution Bill 2010* on 2 August 2011, the then Minister observed at 2309: ‘*The severity threshold requires that the view must be nearly blocked out*’.

3.111 QCAT has considered the meaning of a ‘severe obstruction’. In *Laing & Anor v Kokkinos & Anor (No 2)*¹⁷⁰ QCAT held that, in the context of the Act, the word ‘severe’ in section 66 of the Act means ‘the obstruction must be considerable’.¹⁷¹

3.112 The meaning of ‘severe obstruction’ has also been judicially considered in the context of similar legislation in New South Wales.¹⁷² In *Wood v Bergman*,¹⁷³ the NSW Land and Environment Court (NSWLEC) said:¹⁷⁴

The Macquarie Dictionary uses words such as "harsh; harshly extreme; grave; causing discomfort or distress; hard to endure; rigidly exact" to define 'severe'. The Oxford Dictionary includes "austere; strict; harsh; extreme". These words set the test at a high level ... for an obstruction to be 'severe', the majority of the view would have to be obscured from the living area demonstrated to be the most frequently used.

3.113 In *Haindl v Daisch*,¹⁷⁵ the NSWLEC described a ‘view’ as:¹⁷⁶

¹⁷⁰ [2013] QCATA 247.

¹⁷¹ Ibid [36].

¹⁷² The Act was modelled, in part, on the *Trees (Disputes Between Neighbours) Act 2006* (NSW).

¹⁷³ [2011] NSWLEC 1068.

¹⁷⁴ Ibid [19]–[20].

¹⁷⁵ [2011] NSWLEC 1145.

¹⁷⁶ Ibid [26].

... [relating to] the totality of what can be seen from the viewing location and does not permit some slicing up of that outlook - thus requiring separate assessment of the severity of obstruction of the view from a particular viewing location on some incremental, slice by slice basis.

3.114 In *Laing & Anor v Kokkinos & Anor (No 2)*¹⁷⁷ QCAT referred with approval to *Haindl v Daisch* where the NSWLEC observed that the assessment of severity has both quantitative and qualitative elements.¹⁷⁸ QCAT also followed the NSWLEC decision of *Tenacity Consulting v Warringah*¹⁷⁹ and adopted a three step test to assess a view:¹⁸⁰

The first step is to identify and value the type of views affected: water views and iconic views are valued more than views not of those things; and whole views are valued more highly than partial views.

The second step identifies the part of the dwelling [where] the views exist and the reasonableness of protecting views from such areas: views across side boundaries are more difficult to protect than front and rear boundaries; sitting views are more difficult to protect than standing views.

The third step assesses the impact of the interference to the views of the whole property, not just for the view that is affected: views from living areas are more significant than from bedrooms or service areas, except those from kitchens which are highly valued.

3.115 QCAT decided that the natural and ordinary meaning of the term 'view' in the context of the Act is:¹⁸¹

a single view with various elements contained within, including the trees themselves, not multiple views requiring separate analysis.

3.116 The question for QCAT was summarised as:¹⁸²

balancing the interests of maintaining a tree at its current height, width or shape against fairness to neighbours whose views have been severely obstructed.

3.117 Without limiting the powers of QCAT to make orders under section 66(2) of the Act, a QCAT order may: ¹⁸³

- require or allow a tree-keeper or neighbour to carry out work on a tree or to perform work on an ongoing basis;¹⁸⁴

¹⁷⁷ [2013] QCATA 247 [37].

¹⁷⁸ *Haindl v Daisch* [2011] NSWLEC 1145 [64].

¹⁷⁹ [2004] NSWLEC 140.

¹⁸⁰ *Laing & Anor v Kokkinos & Anor (No 2)* [2013] QCATA 247 [39]–[41].

¹⁸¹ Ibid [43]–[45], citing *Haindl v Daisch* [2011] NSWLEC 1145 [28].

¹⁸² [2013] QCATA 247 [61].

¹⁸³ *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Qld) s 66(5).

¹⁸⁴ *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Qld) s 66(5)(a). Eg, QCAT can make a height maintenance order, requiring the 'tree-keeper' to regularly trim the tree.

- require a survey be undertaken to define the location of a tree, if there is doubt about its location in relation to the common boundary;¹⁸⁵
- require a person to make an application to obtain a consent or other authorisation from a relevant agency in relation to a tree;¹⁸⁶
- authorise a person to enter the tree-keeper's land to carry out an order under this section, including entering land to obtain a quotation for carrying out an order;¹⁸⁷
- require the tree-keeper or neighbour to pay the costs associated with carrying out an order;¹⁸⁸
- require a tree-keeper to pay compensation to a neighbour for damage to the neighbour's land or any property on the neighbour's land;¹⁸⁹ and
- require a report from an appropriately qualified arborist.¹⁹⁰

Responsibility for the costs of a tree assessor

3.118 Arborists or tree assessors give expert evidence in QCAT proceedings concerning trees. The Act does not make any provision for the costs of an arborist or tree assessor.

3.119 In contrast, the Act does provide a process for determining who is responsible for the costs of a cadastral surveyor in circumstances where a common boundary is not agreed by the adjoining owners.¹⁹¹

3.120 Chapter 2 Part 6 Division 7 of the *Queensland Civil and Administrative Tribunal Act 2009* (Qld) (QCAT Act) provides for the appointment of assessors with relevant knowledge, expertise and experience to help QCAT in a proceeding.

3.121 QCAT Practice Direction 7 of 2013¹⁹² provides for cost arrangements for tree assessors pursuant to section 112 of the QCAT Act. A key aim of the Practice Direction is to avoid parties incurring excessive costs by engaging their own experts to report on the tree/s in dispute.¹⁹³

¹⁸⁵ *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Qld) s 66(5)(b).

¹⁸⁶ *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Qld) s 66(5)(c).

¹⁸⁷ *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Qld) s 66(5)(d).

¹⁸⁸ *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Qld) s 66(5)(e).

¹⁸⁹ *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Qld) s 66(5)(f).

¹⁹⁰ *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Qld) s 66(5)(g). See [3.118]–[3.123] below.

¹⁹¹ *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Qld) s 40.

¹⁹² Queensland Civil and Administrative Tribunal, *Practice Direction No 7 of 2013 — Arrangements for orders to resolve other issues about trees*, 3 April 2014.

¹⁹³ *Ibid* [5].

3.122 The assessor is asked to inspect the tree/s and the properties the subject of the application and provides a report to QCAT, as expert evidence, which will outline solutions to the issues raised in the application.¹⁹⁴

3.123 QCAT Practice Direction 7 of 2013 also provides that:

- QCAT may make an order requiring a party or all parties to pay all or part of the costs of the assessor up to a total of \$1 000.¹⁹⁵
- QCAT's consideration of the parties' payment of the assessor's costs starts from the general proposition that the parties are to share equally the costs of the tree assessor.¹⁹⁶
- In its absolute discretion, however, QCAT may make a different order, having regard to the contents of the application, any other submission or document filed in the proceedings and any other matter QCAT may consider relevant.¹⁹⁷

3-15 Should the Act provide for cost arrangements for meeting / sharing the costs of reports from arborists or other experts, and if so in what way?

Scope of QCAT's power to override other laws

3.124 Subject to exceptions, QCAT must not make an order to carry out work on a tree if the work is prohibited under another Act.¹⁹⁸ However, if QCAT is satisfied that an application is made because of a genuine dispute, it may order a person to carry out work on a tree notwithstanding that the work is restricted or prohibited under a local law or consent is withheld by a local government or a 'tree-keeper' under a vegetation protection order or other similar order or law protecting the tree.¹⁹⁹

¹⁹⁴ Ibid.

¹⁹⁵ Ibid [6].

¹⁹⁶ Ibid [7].

¹⁹⁷ Ibid.

¹⁹⁸ *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Qld) s 67(3).

¹⁹⁹ *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Qld) s 67(1). The specific intention of the Act is to reduce the risk of injury to persons and reduce property damage by allowing QCAT to override a local law, including a vegetation protection order, to ensure that if required, persons and property are fully protected from possible or future harm or damage: Queensland, *Parliamentary Debates*, Legislative Assembly, 2 August 2011, 2293 (PT Lucas, Deputy Premier and Attorney-General, Minister for Local Government and Special Minister for State).

QCAT order in relation to a tree that has been removed

3.125 QCAT may make an order under section 66 of the Act even if the tree has been completely removed. A tree that is removed following serious damage or injury that resulted in an application to QCAT is still taken to be situated on land for the purpose of the application if the tree was situated wholly or principally on the land immediately before the damage or injury occurred.²⁰⁰ This allows a neighbour to apply for an order requiring the tree-keeper to pay compensation or repair costs for damage caused by a tree even if the tree-keeper has completely removed the tree since the damage or injury occurred.

3.126 QCAT cannot, however, make an order to remedy damage caused by a tree that has been completely removed if the tree-keeper has sold the land on which the tree was situated since the damage was caused.²⁰¹

3-16 Should liability under section 68 of the Act for damages caused by trees that have been removed, be extended to a former owner?

Additional order if destruction or removal of tree ordered

3.127 If QCAT makes an order for the destruction or removal of a tree, it may also order that the tree be replaced with a tree appropriate to the environment and surroundings, or a tree of a different maturity level.²⁰² For example, a tree that is removed under a QCAT order may have been a mature tree of a particular species. QCAT can order that a tree of less maturity and of a different species replace the removed tree. QCAT can also order that the replacement tree be situated in a place other than the place where the destroyed or removed tree was originally situated.²⁰³ This might occur where the destroyed or removed tree was situated close to the common boundary and overhanging the neighbour's property.

Matters for QCAT to consider when deciding an application

3.128 The Act²⁰⁴ outlines the matters for QCAT to consider when deciding an application for an order under section 66 of the Act.

3.129 The primary consideration is the safety of any person.²⁰⁵ The Act also expressly provides that a living tree should not be removed or destroyed unless the

²⁰⁰ *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Qld) s 47(2).

²⁰¹ *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Qld) s 68(2).

²⁰² *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Qld) s 69(a).

²⁰³ *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Qld) s 69(b).

²⁰⁴ *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Qld) ch 3 pt 5 div 4.

²⁰⁵ *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Qld) s 71.

issue relating to the tree cannot otherwise be satisfactorily resolved.²⁰⁶ Alternatives to removal should be considered, for instance, pruning.

Matters QCAT must consider

3.130 Section 73 of the Act lists general matters that must be considered by QCAT, such as the location of the tree in relation to the boundary of the land;²⁰⁷ whether the tree has any historical, cultural, social or scientific value;²⁰⁸ any contribution the tree makes to the local ecosystem, natural landscape and scenic value of the land or locality²⁰⁹ or public or private amenity²¹⁰ together with a host of other matters.²¹¹

Matters QCAT may consider

3.131 In addition to these general matters that must be considered, the Act sets out a range of other matters QCAT may consider depending on whether the neighbour makes an allegation the tree:

- has caused, is causing, or is likely to cause serious injury or serious damage to the neighbour's land or property on the land;²¹² or
- has caused or is causing, substantial, ongoing and unreasonable interference with the use and enjoyment of the neighbour's land.²¹³

3.132 For example, if the neighbour alleges the tree has caused, is causing, or is likely to cause serious injury to any person or serious damage to the neighbour's land or any property on the neighbour's land, under section 74 of the Act, QCAT may consider anything other than the tree that has contributed, or is contributing, to the injury or damage or the likelihood of injury or damage. This may include any act or omission by the neighbour and the impact of any tree situated on the neighbour's land,²¹⁴ and any steps taken by the tree-keeper or the neighbour to prevent or rectify the injury or damage or the likelihood of injury or damage.²¹⁵

3.133 In making an order to carry out work under section 66 of the Act that involves destroying a tree, QCAT may consider how long the neighbour has known

²⁰⁶ *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Qld) s 72.

²⁰⁷ *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Qld) s 73(1)(a).

²⁰⁸ *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Qld) s 73(1)(c).

²⁰⁹ *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Qld) s 73(1)(d)–(e).

²¹⁰ *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Qld) s 73(1)(f), (g).

²¹¹ *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Qld) s 73(1)(b), (h), (k).

²¹² *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Qld) s 74(1).

²¹³ *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Qld) s 75.

²¹⁴ *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Qld) s 74(1)(a).

²¹⁵ *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Qld) s 74(1)(b).

of the injury or damage;²¹⁶ any steps that have been taken by the tree-keeper or the neighbour to prevent further injury or damage;²¹⁷ anything other than the tree that may have caused, or contributed to, some or all of the injury or damage;²¹⁸ and any other matter QCAT considers relevant.²¹⁹

3.134 If the neighbour alleges the tree has caused, or is causing, substantial, ongoing and unreasonable interference with the use and enjoyment of the land affected by the tree QCAT may consider a number of other matters.²²⁰ They include whether anything, other than the tree, has contributed or is contributing to the interference;²²¹ any steps taken by the tree-keeper or the neighbour to prevent or minimise the interference;²²² the size of the neighbour's land;²²³ and whether the tree existed before the neighbour acquired the land.²²⁴

3.135 For interference that is an obstruction of sunlight or a view, QCAT may consider any contribution the tree makes to the protection or revegetation of a waterway or foreshore.²²⁵

3-17 Are there any additional matters which it is appropriate that QCAT must consider under section 73 of the Act?

3-18 Should section 75 of the Act be changed to include a further matter QCAT may consider for interference which is an obstruction of sunlight or a view, namely when the obstruction / interference arose?

Copy of order to be given to government authority

3.136 QCAT must give a copy of any order it makes in relation to a tree to the local government for the local government area in which the tree is situated and any relevant authority that appeared in the proceeding (which may include the local government for the area).²²⁶

²¹⁶ *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Qld) s 74(2)(a).

²¹⁷ *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Qld) s 74(2)(b).

²¹⁸ *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Qld) s 74(2)(c).

²¹⁹ *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Qld) s 74(2)(d).

²²⁰ *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Qld) s 75.

²²¹ *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Qld) s 75(a).

²²² *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Qld) s 75(b).

²²³ *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Qld) s 75(c).

²²⁴ *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Qld) s 75(d).

²²⁵ *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Qld) s 75(e).

²²⁶ *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Qld) s 76.

Failure to comply with a QCAT order

3.137 Section 77 of the Act provides that a person must not fail to comply with a requirement imposed on the person under Chapter 3 of the Act unless there is a reasonable excuse. Non-compliance is an offence punishable by a maximum penalty of 1000 penalty units.²²⁷

3-19 Have any difficulties arisen in respect of non-compliance with QCAT orders about trees?

When QCAT order lapses or may be revoked

3.138 An order made by QCAT under Chapter 3 lapses 10 years after the day on which the order was made, unless the order expressly provides otherwise.²²⁸

3.139 QCAT may revoke an order it considers has been satisfied, either on application or on its own initiative.²²⁹

Register of QCAT orders

3.140 QCAT must keep a register of orders (other than obsolete orders) made under Chapter 3 of the Act.²³⁰

3.141 QCAT must keep the register in electronic form and in such a way that a search of the register for particular land will show the existence of any order affecting the land, the time for carrying out the order and the person responsible for carrying out the order.²³¹ For this purpose, land is affected by an order about a tree if, at the time the order was made, an owner of the land was a tree-keeper or neighbour for the tree.²³²

3.142 QCAT publishes on its website a tree orders register which shows the existence of orders affecting land, including the time for carrying out the order and the person responsible for carrying out the order.²³³

3.143 QCAT must, within 14 days of making an order under Chapter 3 (other than an order revoking another order), enter into the register the prescribed

²²⁷ *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Qld) s 71. The current prescribed value of a penalty unit is \$113.85: *Penalties and Sentences Act 1992* (Qld) ss 5(1)(e), 5A(1); *Penalties and Sentences Regulation 2005* (Qld) s 2B. As from 1 July 2015, the prescribed value of a penalty unit will be \$117.80: *Penalties and Sentences Amendment Regulation (No. 1) 2015* (Qld) ss 2, 4.

²²⁸ *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Qld) s 78(1).

²²⁹ *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Qld) s 78(2).

²³⁰ *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Qld) s 79(1).

²³¹ *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Qld) s 79(2).

²³² *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Qld) s 79(3).

²³³ See <<http://www.qcat.qld.gov.au/matter-types/tree-disputes/tree-order-register>>.

information for the order.²³⁴ This is to facilitate searches by potential purchasers of land.

3.144 QCAT must, within 14 days of making an order that revokes another order remove from the register the information for the other order.²³⁵

3.145 A person may search the register and obtain a certified copy of the register record in relation to any order made under Chapter 3.²³⁶

3.146 The tree orders register does not list tree dispute applications.²³⁷

SALE OR PROPOSED SALE OF AFFECTED LAND

3.147 Part 7 of Chapter 3 provides mechanisms for ensuring that a seller discloses to a buyer the existence of a QCAT application or QCAT order affecting the land in relation to a tree.

Definitions

3.148 An 'application' means an application made under Chapter 3 that has not been decided, dismissed, struck out or withdrawn by QCAT.²³⁸

3.149 'Land affected by an application or order' means the land on which a tree is situated which is the subject of an application or order.²³⁹

3.150 An 'order', for a sale of a person's land affected by an order, means an order under Chapter 3 requiring a person to carry out work in relation to a tree.²⁴⁰

3.151 The meaning of 'transfer day', for the sale of land, means the day the contract of sale settles.²⁴¹

Person must give the buyer a copy of the application or order before the buyer enters into a contract of sale

3.152 Section 83 of the Act provides that if a person is selling land affected by an application or order, the person must give the buyer a copy of the application²⁴² or

²³⁴ *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Qld) s 80(1)–(2). Note that regulations can dictate the prescribed information however no relevant regulations have been made.

²³⁵ *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Qld) s 80(3).

²³⁶ *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Qld) s 81(1).

²³⁷ To identify existing applications a search can be undertaken of QCAT's register of proceedings: see [3.152]ff.

²³⁸ *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Qld) s 82 (definition of 'application').

²³⁹ *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Qld) s 82 (definition of 'land affected by an application or order').

²⁴⁰ *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Qld) s 82 (definition of 'order').

²⁴¹ *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Qld) sch (definition of 'transfer day').

order²⁴³ before the buyer enters into a contract of sale for the land, unless the person has a reasonable excuse.²⁴⁴ The buyer is then alerted to the application or order and is fully informed before signing the contract.²⁴⁵

Consequences if a copy of the application is given to the buyer before the contract of sale is entered into

3.153 Section 84 of the Act provides that if a person selling land gives a copy of an application to a buyer before the contract of sale is entered into, the buyer is joined as a party to the QCAT proceeding when the buyer enters into a contract of sale.²⁴⁶

- 3-20 Should the person selling the land (the tree-keeper) also provide to the buyer (in addition to the application) any additional material filed?**
- 3-21 Should the Act be changed to require that the person selling the land (the tree-keeper) notify QCAT that there is a new party to the application as a result of the buyer being joined as a party to the QCAT proceeding when the buyer enters into the contract of sale pursuant to section 84?**

Where the application is filed after the contract is entered but before settlement

3.154 Section 83 of the Act does not apply where an application is filed after a contract of sale is entered into but before settlement.²⁴⁷

²⁴² Any tree applications made to QCAT can be located by searching the QCAT register of proceedings (maintained under *Queensland Civil and Administrative Tribunal Act 2009* (Qld) s 229) or the QCAT record of proceedings (maintained under *Queensland Civil and Administrative Tribunal Act 2009* (Qld) s 230).

²⁴³ Tree orders made by QCAT are recorded in the tree orders register (maintained by QCAT under *Queensland Civil and Administrative Tribunal Act 2009* (Qld) s 79) as an electronic register searchable online: see <<http://www.qcat.qld.gov.au/matter-types/tree-disputes/tree-order-register>>.

²⁴⁴ *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Qld) s 83.

²⁴⁵ Seller disclosure in Queensland is the subject of a separate detailed review being undertaken by the Commercial and Property Law Centre, QUT Law, on behalf of the Queensland Government, as part of a broader review of the *Property Law Act 1974* (Qld): see QUT Law, Commercial and Property Law Centre, 'Queensland Government Property Law Review - Seller disclosure in Queensland' (Issues Paper 1, February 2014).

²⁴⁶ *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Qld) s 84.

²⁴⁷ Information provided by the Queensland Civil and Administrative Tribunal, 15 January 2015.

3-22 Should the Act be changed to cover the situation where an application is filed after the contract is entered but before settlement? If so, what rights and responsibilities should the Act provide?

Consequences if a copy of the order is given to the buyer

3.155 If a seller gives a copy of an order to a buyer before entry into a contract of sale then on the transfer day the buyer becomes, to the extent that the seller/tree-keeper has not carried out the work required under the order, bound by the order to carry out the work ordered as if the buyer were the person named in the order.²⁴⁸

3.156 Any period mentioned in the order for carrying out the order commences on the transfer day.²⁴⁹

Consequences before transfer if a copy of the application or order is not given to the buyer

3.157 Section 86 of the Act sets out the buyer's rights if a copy of a QCAT order or application to QCAT is not given to them as required under Chapter 3.

3.158 The buyer may terminate the contract of sale at any time before the contract settles by giving a signed, dated notice of termination to the seller or the seller's agent.²⁵⁰

3.159 The notice of termination must state that the contract is terminated under section 86.²⁵¹ If the contract is terminated, the seller must, within 14 days after the termination, refund any deposit paid under the contract to the buyer.²⁵²

3.160 If the seller instructs a person who holds the deposit to refund the deposit paid under the contract to the buyer, that person must immediately refund the deposit to the buyer.²⁵³

3.161 If the contract is terminated under the Act, the seller and the person acting for the seller who prepared the contract, are liable to the buyer for the reasonable legal and other expenses incurred by the buyer in relation to the contract after the buyer signed the contract.²⁵⁴

²⁴⁸ *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Qld) s 85(a).

²⁴⁹ *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Qld) s 85(b).

²⁵⁰ *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Qld) s 86(2).

²⁵¹ *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Qld) s 86(3).

²⁵² *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Qld) s 86(4).

²⁵³ *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Qld) s 86(5).

²⁵⁴ *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Qld) s 86(6).

3.162 If more than one person is liable to reimburse the buyer for legal and other expenses, their liability is joint and several.²⁵⁵

3.163 An amount payable to the buyer under section 86 is recoverable as a debt in a court of competent jurisdiction.²⁵⁶

Consequences after transfer if a copy of the order is not given to the buyer

3.164 Section 87 of the Act applies if a person selling land affected by an order fails to give to the buyer a copy of the order before the buyer enters into a contract of sale for the land and has not, before the transfer day, carried out all the work the person is required to carry out under the order.²⁵⁷

3.165 Despite ownership of the land being transferred to the buyer, the person selling the land remains liable to carry out the work required under the order.²⁵⁸

3-23 Is it appropriate that the person who is acting for the seller and prepared the contract, be liable under section 87 of the Act to reimburse the buyer for legal and other expenses incurred by the buyer in relation to the contract?

3-24 If it is appropriate that the person who is acting for the seller and prepared the contract be liable, should that person be jointly and severally liable?

QCAT application or order is not recorded on the land title

3.166 QCAT applications and orders made under Chapter 3 of the Act are not noted on the land title.

3.167 QCAT advises that legal representatives contact the QCAT registry requesting a search of the QCAT register of proceedings to identify whether any applications under Chapter 3 have been filed with respect to specific land.²⁵⁹

3.168 A QCAT order²⁶⁰ does not run with the land. It operates as a personal order against the tree-keeper and is not an order that can be enforced against a

²⁵⁵ *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Qld) s 86(7).

²⁵⁶ *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Qld) s 86(8).

²⁵⁷ *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Qld) s 87(1).

²⁵⁸ *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Qld) s 87(2).

²⁵⁹ Information provided by the Queensland Civil and Administrative Tribunal, 29 June 2015.

²⁶⁰ Tree orders made by QCAT under Chapter 3 affecting land are recorded in a tree orders register managed by QCAT as an electronic register searchable online. See [3.140]–[3.145].

subsequent owner of the tree-keeper's land²⁶¹ except in the circumstances outlined in section 85 of the Act.

ASSISTANCE FROM LOCAL GOVERNMENT

3.169 Part 8 of Chapter 3 establishes enforcement procedures that may be undertaken by a local government if a tree-keeper fails to carry out work on a tree under a QCAT order.

Local government may decide to carry out work on a tree under a QCAT order

3.170 Section 88 of the Act applies if QCAT has made an order under Chapter 3 requiring a tree-keeper to carry out work on a tree within a specified period and the work has not been carried out within that period.²⁶²

3.171 A neighbour may advise the relevant local government, not less than 7 days after the end of the specified period, that the tree-keeper has not carried out work on a tree as required by a QCAT order and request the local government to act.²⁶³

3.172 The local government may elect to carry out the work on the tree as required by the QCAT order. However, the local government is not required to take any action.²⁶⁴

3.173 An appropriately qualified person authorised by the local government (an 'authorised person') may enter the tree-keeper's land to inspect the tree to determine if the work has been carried out as required by the QCAT order, and if it has not been done, carry out the work as required by the order.²⁶⁵

3.174 Before an authorised person enters the tree-keeper's land under this section, the local government must give the tree-keeper²⁶⁶ at least 7 days notice of the intention to enter the land.²⁶⁷

3.175 Notice is not required if the tree-keeper consents to entry, entry to the land is required because of the existence or likelihood of a serious risk to safety, or entry

²⁶¹ Deputy Premier and Attorney-General, Minister for Local Government and Special Minister of State, 'Neighbourhood Disputes Resolution Bill 2010: Results of Consultation Process' (November 2010) 9 at Department of Premier and Cabinet (Qld), *Cabinet documents* (6 August 2014) <<http://rti.cabinet.qld.gov.au/cabinet.aspx>>.

²⁶² *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Qld) s 88(1)(a)–(c).

²⁶³ *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Qld) s 88(1)(c).

²⁶⁴ *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Qld) s 88(2).

²⁶⁵ *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Qld) s 88(3).

²⁶⁶ For the requirements of a notice see *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Qld) s 89.

²⁶⁷ *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Qld) s 88(4).

is required urgently and the chief executive of the local government has authorised in writing entry without notice.²⁶⁸

3.176 If an authorised person enters the tree-keeper's land because of the existence or likelihood of a serious risk to safety or because urgent entry has been authorised, the local government must give the tree-keeper a 'Notice of entry to land' within 10 business days after the entry is made.²⁶⁹

3.177 An authorised person must enter the tree-keeper's land only to a reasonable extent needed to carry out the work required.²⁷⁰

3.178 An authorised person may not enter the tree-keeper's land to inspect or carry out work on a tree without possessing an authority²⁷¹ for this purpose. The authority must be produced if required by the tree-keeper.²⁷²

3.179 The costs incurred by the local government in carrying out the work and any administration fee charged by the local government are charges on the tree-keeper's land as if they were unpaid amounts under the *Local Government Act 2009* (Qld), section 95, or the *City of Brisbane Act 2010* (Qld), section 97.²⁷³

Requirements of notice of intention to enter land of the tree-keeper

3.180 A notice of intention to enter the land of the tree-keeper must be in writing.²⁷⁴

3.181 A copy of the relevant QCAT order and section 88 of the Act must be attached to the notice.²⁷⁵ The notice must state the section of the Act under which the notice is given, the name of the tree-keeper to whom it is given, the land to which the notice applies, the purpose of the entry and the day on which the authorised person is to enter the land.²⁷⁶

²⁶⁸ *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Qld) s 88(5).

²⁶⁹ *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Qld) s 88(5A).

²⁷⁰ *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Qld) s 88(5B).

²⁷¹ *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Qld) s 88(6). For the requirements of an authority see *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Qld) s 90.

²⁷² *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Qld) s 88(6).

²⁷³ *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Qld) s 88(7).

²⁷⁴ *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Qld) s 89(a).

²⁷⁵ *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Qld) s 89(b).

²⁷⁶ *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Qld) s 89(c). If the notice is under s 88(5A) of the Act (to advise of an entry without notice), then the notice must state the day the authorised person entered the land.

Requirements of authority to enter land of the tree-keeper

3.182 An authority to enter the tree-keeper's land must be in writing and be signed by the chief executive of the local government.²⁷⁷

3.183 The authority must state that it is issued under the Act, the name of the person to whom it is issued, the land to which the authority applies, that the person has authority to enter the land, the purpose for which the land is being entered, whether the person has authority to carry out any work required under an order and the date, not more than 90 days from the date of the authority, on which it expires.²⁷⁸

OTHER MATTERS

- | | |
|-------------|--|
| 3-25 | How do the responsibilities imposed on a tree-keeper affect the resolution of issues between neighbours about trees? |
| 3-26 | Are there any other matters that you wish to raise in relation to how trees are dealt with under the Act or under any other Act or law? |

²⁷⁷ *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Qld) s 90(a).

²⁷⁸ *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Qld) s 90(b).

Chapter 4

Dispute Resolution Processes, Compliance and Enforcement

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INTRODUCTION

4.1 This chapter of the Discussion Paper discusses the resolution of neighbourhood disputes under the *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Qld) (the Act) including the central role of the Queensland Civil and Administrative Tribunal (QCAT). It describes in detail the dispute resolution processes under the Act and discusses the terms of reference specific to this chapter. It poses questions concerning the operation and effectiveness of the dispute resolution processes under the Act.

Terms of reference specific to the chapter

4.2 The terms of reference include:¹

- whether dispute resolution processes under the Act are fair, just and effective;
- whether the Act provides QCAT with sufficient powers to resolve issues;
- the appropriateness of the remedies and penalties provided in the Act, including for non-compliance with QCAT orders; and
- the operation of the Act in relation to other Acts or laws.

RELEVANT LEGISLATION AND REVIEWS

DJAG review of neighbourly relations 2007–10 (DJAG review)

4.3 The DJAG review identified as common challenges neighbours faced in resolving their disputes:²

- an absence of strong enforcement measures and actions by authorities;
- access to effective and speedy dispute resolution processes;
- reluctance by neighbours to participate in alternative dispute resolution processes; and
- high financial and mental cost of seeking a remedy through the court system, especially where the only option was reliance on the common law.

4.4 A range of options was considered in response to this review but ultimately not adopted in the Neighbourhood Disputes Resolution Bill 2010 (Qld).³

¹ See paragraphs 3(b)–(f) of the terms of reference. The terms of reference are set out in full in Appendix A of this Discussion Paper.

² Department of Justice and Attorney-General (Qld), 'Review of Neighbourly Relations: Resolving Neighbourhood Disputes' (Discussion Paper, July 2008) 1–2.

Queensland Civil and Administrative Tribunal Act 2009 (Qld)

4.5 The QCAT Act⁴ establishes QCAT as an independent tribunal to deal with matters in a way that is accessible, fair, just, economical, informal and quick.⁵

4.6 To achieve these objectives, the QCAT Act incorporates ADR processes as ‘part of the fabric of QCAT’,⁶ enabling QCAT to conduct ‘mediation’⁷ and ‘compulsory conferences’.⁸ The QCAT Act also provides QCAT with the ability to hear and decide minor civil disputes⁹ and to conduct expedited hearings.¹⁰

Neighbourhood Disputes (Dividing Fences and Trees) Act 2011 (Qld)

4.7 An object of the Act is to facilitate the resolution of any disputes about dividing fences or trees that arise between neighbours.¹¹

4.8 The Act confers original jurisdiction on QCAT to hear and decide disputes about dividing fences and trees that otherwise cannot be resolved between neighbours.¹²

4.9 The Act sets out the orders that QCAT may make, for example:

- fencing work, including the construction, repair and removal of a fence;¹³
- the recovery of a debt incurred by removing overhanging branches;¹⁴ and

³ Namely establishing a neighbourhood court, giving the Dispute Resolution Branch within DJAG the function of providing conciliation services in relation to tree and fence disputes and making all agreements reached through mediation enforceable in QCAT: Explanatory Notes, Neighbourhood Disputes Resolution Bill 2010 (Qld) 5.

⁴ The QCAT Act requires that a review of that Act be undertaken within three years of its commencement. The objects of the review include deciding whether the objects of the QCAT Act remain valid, whether the QCAT Act is meeting its objects and whether the provisions of the QCAT Act are appropriate for meeting its objects: *Queensland Civil and Administrative Tribunal Act 2009* (Qld) s 240. In December 2012, DJAG published a Consultation Paper inviting submissions in relation to the review. No report from this review has been published.

⁵ *Queensland Civil and Administrative Act 2009* (Qld) s 3(a)–(b); Queensland, *Parliamentary Debates*, Legislative Assembly, 19 May 2009, 351 (CR Dick, Attorney-General and Minister for Industrial Relations).

⁶ Queensland, *Parliamentary Debates*, Legislative Assembly, 19 May 2009, 352 (CR Dick, Attorney-General and Minister for Industrial Relations).

⁷ *Queensland Civil and Administrative Tribunal Act 2009* (Qld) ch 2 pt 6 div 3. See [4.52]–[4.56] below.

⁸ *Queensland Civil and Administrative Tribunal Act 2009* (Qld) ch 2 pt 6 div 2. See [4.57]–[4.63] below.

⁹ *Queensland Civil and Administrative Tribunal Act 2009* (Qld) s 11.

¹⁰ QCAT may conduct an expedited hearing for a minor civil dispute or a matter that an enabling Act states is a matter for which an expedited hearing may be conducted: *Queensland Civil and Administrative Tribunal Act 2009* (Qld) s 94. See [4.72]–[4.73] below.

¹¹ *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Qld) s 3(b).

¹² *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Qld) ss 33, 61. QCAT’s jurisdiction is discussed at [4.30]–[4.40] below.

¹³ *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Qld) ss 33(2)–(3), 35.

¹⁴ *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Qld) s 58.

- other orders in relation to a tree affecting neighbouring land.¹⁵

Relationship between the Act and the QCAT Act

4.10 Consideration of the QCAT Act, regulation, rules and practice directions¹⁶ is relevant to the terms of reference mentioned in [4.2] above.

4.11 Sections 6 and 7 of the QCAT Act deal generally with the relationship between an enabling Act and the QCAT Act. The Act is an enabling Act conferring original jurisdiction on QCAT.¹⁷

4.12 The QCAT Act states that an enabling Act may provide for particular matters and, in doing so, may add to, otherwise vary, or exclude provisions of the QCAT Act, for example:¹⁸

- QCAT's functions in the neighbourhood disputes jurisdiction;¹⁹
- requirements about applications, referrals or appeals such as timeframes and accompanying documents;²⁰
- conduct of proceedings including practices, procedures and QCAT's powers for neighbourhood dispute proceedings, for example:²¹
 - the availability or non-availability of stays of the operation of a decision the subject of a proceeding;
 - persons who must be notified of a proceeding, a hearing of a proceeding or the tribunal's decision in a proceeding;
 - additional persons who are a party to a proceeding;
 - persons who may be represented in a proceeding without the tribunal's leave; and

¹⁵ *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Qld) s 66.

¹⁶ *Queensland Civil and Administrative Tribunal Act 2009* (Qld) s 226(1): 'The president may make practice directions for the tribunal about the practices and procedures of the tribunal not provided for, or not sufficiently provided for, in this Act, an enabling Act or the rules'.

¹⁷ An 'enabling Act' is, inter alia, an Act, other than the QCAT Act, that confers original, review or appeal jurisdiction on the tribunal: *Queensland Civil and Administrative Tribunal Act 2009* (Qld) s 6(2)(a). QCAT's jurisdiction is discussed at [4.30]–[4.40] below.

¹⁸ *Queensland Civil and Administrative Tribunal Act 2009* (Qld) ss 6–7. Note s 6(8): 'This section does not limit another provision of this Act authorising an enabling Act to provide for a particular matter'.

¹⁹ *Queensland Civil and Administrative Tribunal Act 2009* (Qld) s 6(3). See also s 16: 'In exercising its original jurisdiction conferred by an enabling Act, the tribunal may perform the functions conferred on the tribunal by this Act or the enabling Act'.

²⁰ *Queensland Civil and Administrative Tribunal Act 2009* (Qld) s 6(7)(a). Requirements to initiate a proceeding in QCAT are discussed at [4.41]–[4.45] below.

²¹ *Queensland Civil and Administrative Tribunal Act 2009* (Qld) s 6(7)(b). See also s 28(1): 'The procedure for a proceeding is at the discretion of the tribunal, subject to this Act, an enabling Act and the rules'. The conduct of QCAT proceedings is discussed at [4.26]ff below.

- hearings that must be held in private;
- enforcement of QCAT's decisions about dividing fences and trees;²²
- QCAT's power to make an order in the nature of an injunction²³ or a declaration;²⁴
- conduct of compulsory conferences;²⁵
- matters for which an expedited hearing may be conducted;²⁶
- costs;²⁷
- constitution of the tribunal;²⁸ and
- claims to recover a debt or liquidated demand of money up to \$25 000 which are to be minor civil disputes.²⁹

4.13 The Act provides for some, but not all, of these matters.

4.14 The QCAT Act states that if the Act does provide for particular matters, the Act's 'modifying provision' will prevail over the QCAT Act provision which it modifies, to the extent of any inconsistency.³⁰ The QCAT Act must then be read as if the modifying provision were a part of the QCAT Act.³¹ If the Act does not provide for such matters, neighbourhood dispute proceedings before QCAT will be conducted generally in accordance with the QCAT Act, regulation, rules and practice directions.³²

²² *Queensland Civil and Administrative Tribunal Act 2009* (Qld) s 6(7)(c). Non-compliance and enforcement of QCAT decisions are discussed at [4.87]–[4.102] below.

²³ *Queensland Civil and Administrative Tribunal Act 2009* (Qld) s 59(5).

²⁴ *Queensland Civil and Administrative Tribunal Act 2009* (Qld) s 60(4).

²⁵ *Queensland Civil and Administrative Tribunal Act 2009* (Qld) s 70(3). Compulsory conferences are discussed at [4.57]–[4.63] below.

²⁶ *Queensland Civil and Administrative Tribunal Act 2009* (Qld) s 94(1)(b). Expedited Hearings are discussed at [4.72]–[4.73] below.

²⁷ *Queensland Civil and Administrative Tribunal Act 2009* (Qld) s 100. Costs are discussed at [4.81] below.

²⁸ *Queensland Civil and Administrative Tribunal Act 2009* (Qld) s 167(4). The constitution of the tribunal is discussed at [4.74]–[4.77] below.

²⁹ *Queensland Civil and Administrative Tribunal Act 2009* (Qld) sch 3 (definition of 'minor civil dispute' paras 1(a), (2), (definition of 'prescribed amount'). The minor civil disputes jurisdiction is discussed at [4.64] below.

³⁰ *Queensland Civil and Administrative Tribunal Act 2009* (Qld) s 7(1)–(2).

³¹ *Queensland Civil and Administrative Tribunal Act 2009* (Qld) s 7(3).

³² *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Qld) s 5 (Relationship with other Acts or laws): 'Unless otherwise expressly provided for in this Act, this Act does not affect the operation of another Act or law'.

4.15 This review provides the opportunity to consider whether a matter that is usually dealt with by the QCAT Act, regulation, rules and practice directions should be dealt with under the Act instead.

4-1 Should the Act provide for any particular matters that are otherwise dealt with by the QCAT Act, regulation, rules and practice directions? If so, how?

INFORMAL RESOLUTION OF ISSUES WITHOUT THE ASSISTANCE OF A THIRD PARTY

4.16 The Act encourages neighbours to resolve issues ‘informally’, but is silent on what is meant by resolving issues ‘informally’.

4.17 Section 7(3) of the Act provides that ‘[Chapter 2 of the Act] encourages neighbours to attempt to resolve a dividing fence issue informally’. Section 56(1) of the Act (in Part 4 of Chapter 3 of the Act which deals with removal of overhanging branches) provides that: ‘The tree-keeper and neighbour are encouraged to resolve the issue informally’. Section 60(1) of the Act (in Part 5 of Chapter 3 of the Act which deals with QCAT orders to resolve other issues about trees) also provides that: ‘The tree-keeper and neighbour are encouraged to resolve the issue informally’.

4.18 As discussed in previous chapters of this Discussion Paper, the Act refers to the following ways of dealing with issues:

- common law remedies: exercising the modified common law right of abatement;³³
- statutory remedies: giving notices to contribute for fencing work³⁴ or remove overhanging branches;³⁵ and
- local law remedies: resolving a tree dispute under any relevant local law, local government scheme or local government administrative process.³⁶

4-2 Should the provisions which encourage neighbours to resolve their issue ‘informally’ be retained?

³³ *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Qld) ss 41(2)(a), 54, 56(2)(a), 60(2)(a).

³⁴ *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Qld) s 30(2), ch 2 pt 4 div 2.

³⁵ *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Qld) s 41(2)(b), ch 3 pt 4.

³⁶ *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Qld) s 65(b).

INFORMAL RESOLUTION OF DISPUTES WITH THE ASSISTANCE OF A THIRD PARTY

DRB mediation

4.19 One of the ways neighbours may attempt to resolve their dispute is by mediation conducted by the Dispute Resolution Branch (DRB) of DJAG.³⁷ DRB provides a free mediation service for neighbourhood disputes through six centres across Queensland.³⁸

4.20 A neighbour can contact DRB and request a voluntary mediation.³⁹ Mediation can usually take place within two weeks of a request being made, depending on the availability of the neighbours and mediator.⁴⁰ Mediation may be conducted in person or by telephone or video conferencing.⁴¹ The mediator acts as an impartial third party⁴² helping the neighbours to find mutually acceptable solutions.⁴³

4.21 Any agreement reached at a DRB mediation session⁴⁴ is not enforceable in any court, tribunal or body unless the neighbours agree in writing that the agreement is to be enforceable.⁴⁵ This additional requirement may be intended to

37 *Dispute Resolution Centres Act 1990* (Qld); Information provided by the Dispute Resolution Branch, 16 January 2015.

38 *Dispute Resolution Centres Act 1990* (Qld) s 22: This Act establishes dispute resolution centres for the purpose of providing mediation services. The six centres are: Brisbane, Hervey Bay, Rockhampton, Mackay, Townsville and Cairns: Department of Justice and Attorney-General, *Annual Report 2013-14*, 26.

39 *Dispute Resolution Centres Act 1990* (Qld) s 31: Attendance at and participation in mediation sessions are voluntary and a party to a mediation session may withdraw at any time; Queensland Government, *Neighbourhood mediation* (13 May 2015) <<http://www.qld.gov.au/law/legal-mediation-and-justice-of-the-peace/setting-disputes-out-of-court/neighbourhood-mediation/neighbourhood-mediation/>>.

40 Queensland Government, *Neighbourhood mediation* (13 May 2015) <<http://www.qld.gov.au/law/legal-mediation-and-justice-of-the-peace/setting-disputes-out-of-court/neighbourhood-mediation/neighbourhood-mediation/>>.

41 Ibid.

42 *Dispute Resolution Centres Act 1990* (Qld) s 29(4): 'A dispute may not be adjudicated or arbitrated upon at a mediation session'; Queensland Government, *Neighbourhood mediation* (13 May 2015) <<http://www.qld.gov.au/law/legal-mediation-and-justice-of-the-peace/setting-disputes-out-of-court/neighbourhood-mediation/neighbourhood-mediation/>>.

43 Queensland Government, *Neighbourhood mediation* (13 May 2015) <<http://www.qld.gov.au/law/legal-mediation-and-justice-of-the-peace/setting-disputes-out-of-court/neighbourhood-mediation/neighbourhood-mediation/>>. See also *Dispute Resolution Centres Act 1990* (Qld) s 29: the procedure for conducting a mediation session is to be as determined by the director of the dispute resolution centre; mediation sessions are to be conducted with as little formality and technicality, and with as much expedition, as possible.

44 Or drawn up pursuant to a mediation session: *Dispute Resolution Centres Act 1990* (Qld) s 31(3).

45 *Dispute Resolution Centres Act 1990* (Qld) s 31(3).

reflect the flexibility that otherwise attaches to DRB mediations under the *Dispute Resolution Centres Act 1990* (Qld).⁴⁶

4.22 One option considered in response to the DJAG review, but not adopted in the Neighbourhood Disputes Resolution Bill, was to make all agreements reached at mediation enforceable in QCAT.⁴⁷ An agreement may be enforceable in QCAT if the neighbours initiate a proceeding in QCAT⁴⁸ and file the signed written terms of the agreement in the QCAT registry.⁴⁹ QCAT may then make orders necessary to give effect to the agreement and consistent with the powers conferred upon it by the Act and the QCAT Act.⁵⁰

4.23 DRB plays a significant role in resolving neighbourhood disputes. For example, in the period between 1 November 2013 and 31 October 2014, DRB received 2817 enquiries regarding matters under the Act: 1482 concerning fences and 1335 concerning trees.⁵¹ In the same period, DRB received 116 requests for mediation: 57 concerning fences and 59 concerning trees.⁵² DRB scheduled 39 mediations that year: 23 concerning fences and 16 concerning trees.⁵³ Whilst the number of initial enquiries had increased by comparison to two previous years, the numbers of mediations had slightly decreased.⁵⁴

4.24 DRB also provides mediation services to QCAT for minor civil disputes (which include dividing fence disputes).⁵⁵ QCAT mediations in Brisbane are conducted by both DRB mediators and QCAT mediators. During the 2013–14 reporting period, DRB mediators achieved a 38% settlement rate while QCAT mediators achieved a 63% settlement rate.⁵⁶

4.25 The Act does not contain any reference to DRB mediation.

⁴⁶ Regarding the rationale for s 31 of the *Dispute Resolution Centres Act 1990* (Qld) ('Mediation to be voluntary'), see: Queensland, *Parliamentary Debates*, Legislative Assembly, 7 June 1990, 2386 (P Beattie): 'The very informal process is clearly spelt out in that clause [4.4] [s 31]'; 2393 (D Briskey): 'These clauses enable open and honest communication between the disputants. Clause 4.4 allows disputants the flexibility to say what they feel. ... It also provides disputants with the right to take further action, if they so wish'. See also s 31(4): 'Except as expressly provided in this Act, nothing in this Act affects any rights or remedies that a party to a dispute has apart from this Act'.

⁴⁷ Explanatory Notes, Neighbourhood Disputes Resolution Bill 2010 (Qld) 5.

⁴⁸ Initiating a process in QCAT is discussed at [4.41]ff below.

⁴⁹ *Queensland Civil and Administrative Tribunal Act 2009* (Qld) s 86, sch 3 (definition of 'proceeding').

⁵⁰ *Queensland Civil and Administrative Tribunal Act 2009* (Qld) ss 86–87: an order giving effect to a settlement may be made only if the entity making the order is satisfied the tribunal could make a decision in the terms of the settlement or in terms consistent with the settlement.

⁵¹ Information provided by the Dispute Resolution Branch, 16 January 2015.

⁵² Ibid.

⁵³ Ibid.

⁵⁴ Ibid.

⁵⁵ *Queensland Civil and Administrative Tribunal Act 2009* (Qld) ss 75(4), 79(1)(d); Queensland Civil and Administrative Tribunal, *Annual Report 2013–14*, 26–27. QCAT mediation is discussed at [4.52]–[4.56] below.

⁵⁶ Queensland Civil and Administrative Tribunal, *Annual Report 2013–14*, 28.

- 4-3 Should the Act provide for DRB mediation? If so, how?**
- 4-4 Should all agreements about dividing fence and tree disputes reached at DRB mediation be enforceable in QCAT? Or should such an agreement be enforceable in QCAT only if the neighbours agree in writing that it be enforceable?**

FORMAL DISPUTE RESOLUTION PROCESSES: APPLYING TO QCAT

Introduction

4.26 A neighbour who is not successful in resolving a neighbourhood dispute informally using the common law, statutory or local law remedies (outlined above) may be able to apply to QCAT for a remedy.⁵⁷ For example, if a neighbour has given the adjoining owner a notice to contribute for fencing work,⁵⁸ and the adjoining owners have not agreed about the proposed fencing work, either adjoining owner may apply to QCAT and QCAT may make an order to resolve the dispute.⁵⁹ Similarly, if a neighbour has given a tree-keeper a notice to remove overhanging branches,⁶⁰ and the tree-keeper does not comply with the notice, the neighbour may cut and remove the overhanging branches (or arrange for someone else to do this) and seek to recover their reasonable expenses from the tree-keeper through minor civil dispute proceedings in QCAT.⁶¹

4.27 In relation to dividing fence disputes, section 30(3) provides that an owner may apply to QCAT for resolution of a fencing dispute only if the dispute is about:

- carrying out fencing work for which a notice to contribute has been given; or
- carrying out fencing work for a dividing fence without authorisation.⁶²

4.28 In relation to tree disputes, section 65 provides that QCAT may make an order under section 66 of the Act (in relation to trees) only if it is satisfied, among other things, that:

- the neighbour has made a reasonable effort to reach agreement with the tree-keeper;

⁵⁷ See, eg, *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Qld) ss 30, 31(6), 32(6).

⁵⁸ *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Qld) s 31.

⁵⁹ *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Qld) ss 31(6), 35.

⁶⁰ *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Qld) s 57.

⁶¹ *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Qld) s 58. The minor civil disputes jurisdiction is discussed at [4.64] below.

⁶² Authorisation, for a dividing fence, means the adjoining owners have agreed under ch 2 of the Act about fencing work to be carried out for the dividing fence; or that QCAT has ordered that fencing work be carried out for the dividing fence: *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Qld) s 17.

- the neighbour has taken all reasonable steps to resolve the issue under any relevant local law, local government scheme or local government administrative process; and
- if the issue relates to particular overhanging branches, the neighbour cannot properly resolve the issue using the process under Chapter 3 Part 4 (notice for particular overhanging branches).

4.29 This chapter will focus on QCAT's dispute resolution processes as they generally relate to both dividing fences and tree disputes.

QCAT's jurisdiction over neighbourhood disputes

4.30 In dealing with dividing fence and tree matters, QCAT can exercise the jurisdiction conferred by the QCAT Act and the Act.

4.31 Under the QCAT Act, QCAT has the following types of original jurisdiction:⁶³

- the minor civil disputes jurisdiction;⁶⁴ and
- the original jurisdiction conferred by the Act.⁶⁵

4.32 Under the Act, QCAT has jurisdiction to hear and decide the following types of neighbourhood disputes:

- any matter arising under Chapter 2 of the Act (dividing fence disputes);⁶⁶ and
- any matter in relation to a tree in which it is alleged that, as at the date of the application to QCAT, land is affected by the tree (tree disputes).⁶⁷

4.33 Some neighbourhood disputes fall within QCAT's minor civil disputes jurisdiction, namely dividing fence disputes for an amount not more than \$25 000 and overhanging branch debt disputes.

4.34 Other neighbourhood disputes fall within QCAT's original jurisdiction as conferred by the Act, including tree disputes other than overhanging branch debt

⁶³ Review and appeal jurisdictions are also conferred upon the tribunal by the QCAT Act: *Queensland Civil and Administrative Tribunal Act 2009* (Qld) s 9.

⁶⁴ *Queensland Civil and Administrative Tribunal Act 2009* (Qld) ss 10(1)(a), 11–14, sch 3 (definition of 'minor civil dispute' para 1(f)), (definition of 'prescribed amount').

⁶⁵ *Queensland Civil and Administrative Tribunal Act 2009* (Qld) ss 10(1)(b), 15–16.

⁶⁶ *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Qld) s 33(1).

⁶⁷ *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Qld) s 61.

disputes.⁶⁸ These matters are not limited by a prescribed amount and are dealt with in QCAT's civil jurisdiction.⁶⁹

4.35 Dividing fence disputes for an amount not more than \$25 000 are within the definition of 'minor civil dispute' in the QCAT Act:⁷⁰

a claim that is the subject of a dispute under the *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011*, chapter 2 and is for an amount not more than the prescribed amount.

4.36 Overhanging branch debt disputes are minor civil disputes because:

- the QCAT Act's definition of 'minor civil dispute' includes a claim:⁷¹
 - to recover a debt or liquidated demand of money, with or without interest, of up to an amount of \$25 000;
 - for which an enabling Act confers jurisdiction on QCAT to deal with the claim (however called) and the enabling Act expressly states it is a minor civil dispute; and
- the Act (the enabling Act) confers jurisdiction on QCAT to deal with overhanging branch debts and expressly states in the note to section 58(5): 'A debt, with or without interest, of up to the prescribed amount may be recovered in minor civil dispute proceedings under the QCAT Act'.⁷²

4.37 Dividing fence disputes under Chapter 2 of the Act for an amount more than \$25 000 are not within QCAT's minor civil disputes jurisdiction.

4.38 Tree disputes under Chapter 3 of the Act (other than overhanging branch debt disputes) are not within QCAT's minor civil disputes jurisdiction. Such disputes fall within QCAT's civil jurisdiction.

4.39 It is not clear why there is a distinction between dividing fence disputes (for an amount not more than \$25 000), which are classified as minor civil disputes, and tree disputes (other than overhanging branch debt disputes) which are not classified as minor civil disputes.⁷³

⁶⁸ *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Qld) ss 33(1), 61.

⁶⁹ Queensland Civil and Administrative Tribunal, *Annual Report 2013-14*, 8, 26.

⁷⁰ *Queensland Civil and Administrative Tribunal Act 2009* (Qld) sch 3 (definition of 'minor civil dispute' para 1(f)), (definition of 'prescribed amount').

⁷¹ *Queensland Civil and Administrative Tribunal Act 2009* (Qld) sch 3 (definition of 'minor civil dispute' paras 1(a), 2), (definition of 'prescribed amount').

⁷² A note in an Act to the Act or to a provision of the Act, as opposed to a footnote or an editor's note to an Act or a provision of an Act or an endnote to an Act, is part of the Act: *Acts Interpretation Act 1954* (Qld) s 14(4).

⁷³ Prior to the Act's enactment, the QCAT Act provided that all disputes under the *Dividing Fences Act 1953* (Qld) (repealed) and for an amount not more than the prescribed amount were minor civil disputes: *Queensland Civil and Administrative Tribunal Act 2009* (Qld) sch 3 (definition of 'minor civil dispute' para 1(f)) (Act as passed). Draft Explanatory Notes to the Neighbourhood Disputes Resolution Bill 2010 for public consultation stated that neither dividing fence nor tree matters were to be dealt with as minor civil disputes: Draft Explanatory Notes, Neighbourhood Disputes Resolution Bill 2010 (Qld) cls 33, 63. However, the Bill and

4.40 During the 2013–14 financial year, QCAT received 196 applications concerning neighbourhood disputes (within the minor civil disputes jurisdiction and the original jurisdiction conferred by the Act), a decrease from 270 lodgements the previous financial year.⁷⁴ QCAT's clearance rate for the 2013–14 financial year was 131% compared to 80% the previous year.⁷⁵ Approximately half of the matters before QCAT were heard in Brisbane; those outside of Brisbane were heard by either magistrates hearing QCAT minor civil disputes or other QCAT members.⁷⁶

Initiating a proceeding in QCAT

4.41 A neighbour (the applicant) may initiate a proceeding in QCAT by filing an application in the relevant approved form.⁷⁷

4.42 Depending on the type of dispute, applications may be filed in person, by post, by fax, by email or electronically.⁷⁸ Generally, an applicant must pay a fee on filing the application.⁷⁹ The principal registrar of QCAT may waive the fee on application if satisfied that fee payment would cause, or be likely to cause, undue financial hardship.⁸⁰ For minor civil disputes about dividing fences and overhanging branches, application fees range from \$23 for a claim of not more than \$500 to \$294.60 for a claim of more than \$10 000; for applications for other tree orders under section 62(1) of the Act⁸¹ the application fee is \$295.⁸²

the resulting Act did in fact amend the QCAT Act to include Chapter 2 (dividing fence) matters in the definition of 'minor civil dispute': Neighbourhood Disputes Resolution Bill 2010 (Qld) sch 1 pt 2 (QCAT Act para 3); *Neighbourhood Disputes Resolution Act 2011* (Qld) sch 1 pt 2 (QCAT Act para 3) (Act as passed). There is no apparent rationale for the distinction detailed in: Department of Justice and Attorney-General (Qld), 'Review of Neighbourly Relations' (Discussion Papers, May 2007 and July 2008); Deputy Premier and Attorney-General, Minister for Local Government and Special Minister of State, 'Neighbourhood Disputes Resolution Bill 2010: Results of Consultation Process' (November 2010) at Department of Premier and Cabinet (Qld), *Cabinet documents* (6 August 2014) <<http://rti.cabinet.qld.gov.au/cabinet.aspx>>; Explanatory Notes, Neighbourhood Disputes Resolution Bill 2010 (Qld); or Second Reading speeches in Queensland, *Parliamentary Debates*, Legislative Assembly, 25 November 2010, 24 March 2011, 2 August 2011.

74 Queensland Civil and Administrative Tribunal, *Annual Report 2013–14*, 15.

75 Ibid 15.

76 Ibid 8.

77 *Queensland Civil and Administrative Tribunal Act 2009* (Qld) s 241 provides for the Rules Committee to approve forms for use under the QCAT Act. The most relevant forms are: Queensland Civil and Administrative Tribunal, *Form 3 Application for minor civil dispute – minor debt* (Version 4); Queensland Civil and Administrative Tribunal, *Form 53 Application for a minor civil dispute – dividing fences* (Version 2); Queensland Civil and Administrative Tribunal, *Form 51 – Application for a tree dispute* (Version 2).

78 *Queensland Civil and Administrative Tribunal Rules 2009* (Qld) rr 24–27. See also Queensland Civil and Administrative Tribunal, *Making an application to QCAT* (February 2013) <http://www.qcat.qld.gov.au/_data/assets/pdf_file/0003/175530/Fact-sheet-making-an-application.pdf>; Queensland Civil and Administrative Tribunal, *Practice Direction No 2 of 2011 – Electronic filing of applications and other documents in minor debt proceedings*, 9 June 2015.

79 *Queensland Civil and Administrative Tribunal Act 2009* (Qld) s 38.

80 *Queensland Civil and Administrative Tribunal Regulation 2009* (Qld) s 10.

81 Applications to QCAT for an order under s 66 in relation to a tree affecting a neighbour's land.

82 *Queensland Civil and Administrative Tribunal Regulation 2009* (Qld) ss 5–6, sch 1 pt 1. See also Queensland Civil and Administrative Tribunal, *Fees and allowances* (2 April 2015) <<http://www.qcat.qld.gov.au/applying-to-qcat/fees-and-allowances>>.

4.43 Once the application has been filed, the principal registrar may accept or reject the application.⁸³ If the principal registrar accepts the application, a QCAT proceeding starts.⁸⁴ The applicant must then give a copy of the application to each other party to the dispute (the respondent/s).⁸⁵

4.44 A respondent neighbour may have the opportunity to file a response and/or a counter-application (if the respondent wishes to apply for certain orders against another person) using QCAT's standard forms,⁸⁶ depending on the type of dispute:

- A respondent to any minor debt dispute, whether it concerns dividing fences or trees, may file a response within 28 days of being given a copy of the application.⁸⁷ A respondent cannot make a counter-application⁸⁸ but may seek directions or an order that the matter be dealt with as a separate minor debt claim;⁸⁹
- A respondent to any other dividing fence dispute cannot respond to the application⁹⁰ but may make a counter-application or give written evidence or make written submissions to QCAT;⁹¹ and
- A respondent to any other tree dispute may file a response within 28 days of being given a copy of the application⁹² and may make a counter-application.⁹³

4.45 If QCAT accepts a respondent's counter-application, the application and counter-application will be dealt with in the same proceeding.⁹⁴

83 *Queensland Civil and Administrative Tribunal Act 2009* (Qld) s 35.

84 *Queensland Civil and Administrative Tribunal Act 2009* (Qld) s 36.

85 *Queensland Civil and Administrative Tribunal Act 2009* (Qld) s 37.

86 *Queensland Civil and Administrative Tribunal Rules 2009* (Qld) rr 43–51; *Queensland Civil and Administrative Tribunal, Form 7 Response to minor civil dispute – minor debt* (Version 2); *Queensland Civil and Administrative Tribunal, Form 52 Response to application for a tree dispute* (Version 2); *Queensland Civil and Administrative Tribunal, Form 8 Minor civil dispute – counter-application* (Version 2).

87 *Queensland Civil and Administrative Tribunal Rules 2009* (Qld) r 45; *Queensland Civil and Administrative Tribunal, Form 7 Response to minor civil dispute – minor debt* (Version 2).

88 *Queensland Civil and Administrative Tribunal Rules 2009* (Qld) r 48(3).

89 *Queensland Civil and Administrative Tribunal Rules 2009* (Qld) r 49.

90 *Queensland Civil and Administrative Tribunal Rules 2009* (Qld) r 43(1).

91 *Queensland Civil and Administrative Tribunal Rules 2009* (Qld) rr 43(2), 48; *Queensland Civil and Administrative Tribunal, Form 8 Minor civil dispute – counter-application* (Version 2).

92 *Queensland Civil and Administrative Tribunal Rules 2009* (Qld) r 44; *Queensland Civil and Administrative Tribunal, Form 52 Response to application for a tree dispute* (Version 2).

93 *Queensland Civil and Administrative Tribunal Rules 2009* (Qld) r 48.

94 *Queensland Civil and Administrative Tribunal Rules 2009* (Qld) r 51.

Applications concerning contributions for fencing work

4.46 An application concerning a dispute about contributions for fencing work must be made within a one month timeframe — at least one month after the notice to contribute has been given but before two months expires.⁹⁵ This one month timeframe applies to both urgent fencing work⁹⁶ and non-urgent fencing work.⁹⁷

4-5 Are the timeframes in sections 31(6) and 32(6) of the Act, which apply to applications for contribution for fencing work, appropriate?

Alternative dispute resolution for neighbourhood disputes in QCAT

4.47 Pursuant to the QCAT Act, QCAT may refer or direct the parties (the applicant and respondent neighbours) to attend various alternative dispute resolution (ADR) processes prior to hearing, namely conciliation, mediation⁹⁸ and compulsory conference.⁹⁹ QCAT can make orders giving effect to any settlement agreements resulting from QCAT-referred ADR processes, and such orders will have the same effect as orders made by QCAT after deciding the proceeding.¹⁰⁰

4.48 The Act does not contain any reference to QCAT's ADR processes.

Conciliation

4.49 Conciliation is a process which may involve several steps such as telephone conferencing and private or joint sessions.¹⁰¹ The process is facilitated by a neutral conciliator who, depending on their functions, may be able to assist the parties in resolving their dispute by:¹⁰²

- providing information about the operation of the law as relevant to a settlement of the dispute;
- providing an assessment of the merits of the claim; and

⁹⁵ *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Qld) ss 31(6), 32(6). See also s 37(4), which provides that applications for variation of an order authorising carrying out of fencing work must be made within one month of being given a copy of the order.

⁹⁶ *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Qld) s 32(6).

⁹⁷ *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Qld) s 31(6).

⁹⁸ *Queensland Civil and Administrative Tribunal Act 2009* (Qld) ch 2 pt 6 div 3.

⁹⁹ *Queensland Civil and Administrative Tribunal Act 2009* (Qld) ch 2 pt 6 div 2.

¹⁰⁰ *Queensland Civil and Administrative Tribunal Act 2009* (Qld) ch 2 pt 6 div 4.

¹⁰¹ See, eg, conciliation processes under the *Magistrates Courts Act 1921* (Qld) s 42D(2) and the *Residential Tenancies and Rooming Accommodation Act 2008* (Qld) s 398(2).

¹⁰² See, eg, conciliator's functions under the *Magistrates Courts Act 1921* (Qld) s 42E and the *Residential Tenancies and Rooming Accommodation Act 2008* (Qld) s 401.

- informing the parties of the possible consequences should the dispute proceed to hearing, including the orders that may be made.

4.50 At present, QCAT does not refer matters to conciliation in the neighbourhood disputes jurisdiction. However, conciliation is intended to be the ADR process used to resolve fence and tree disputes.¹⁰³ The Act amended the QCAT Act to include a specific rule-making power for conciliation, although no rules regarding conciliation have been made.¹⁰⁴ The QCAT Act provides for the protection and immunity of a conciliator¹⁰⁵ and circumstances in which a person may be in contempt of the tribunal during a conciliation.¹⁰⁶

4.51 Conciliation is the ADR process used in relation to some other disputes before QCAT, for example, residential tenancy disputes and discrimination complaints. In these jurisdictions, the specific enabling legislation (not the QCAT Act) provides for a conciliation process to be conducted outside of QCAT.¹⁰⁷

Mediation

4.52 QCAT will generally refer a minor civil dispute (including a dividing fence dispute) to mediation prior to listing the matter for hearing.¹⁰⁸

4.53 A mediator acts as an independent third party to assist the parties to discuss their differences and find a solution to the issue that suits both parties. It is not the role of the mediator to make a decision about who is right or wrong, but rather to assist the parties in reaching an agreement.

¹⁰³ *Queensland Civil and Administrative Tribunal Act 2009* (Qld) sch 2 para 14A (Conciliation) inserted by *Neighbourhood Disputes Resolution Act 2011* (Qld) ss 103–104 (Act as passed); Explanatory Notes, *Neighbourhood Disputes Resolution Bill 2010* (Qld) 46–47: ‘These clauses [103 to 104] amend the QCAT Act 2009 to include a specific rule-making power for conciliation, which is to be the alternative dispute resolution process used for dividing fences and tree matters under this Act’; Queensland, *Parliamentary Debates*, Legislative Assembly, 25 November 2010, 4372 (CR Dick, Attorney-General and Minister for Industrial Relations): ‘There is a focus throughout the bill on informal resolution of disputes about trees and dividing fences. Conciliation will be the alternative dispute resolution process used to resolve fence and tree disputes. A conciliation process involves a conciliator assisting participants to identify issues in dispute, develop options, consider alternatives and try to reach an agreement. A conciliator will be able to provide advice on matters in dispute and options for resolution but will not make a determination. In keeping with the intention of the bill, it will be up to the neighbours to reach mutual agreement on issues’. For further second reading speeches regarding the intended use of conciliation, see Queensland, *Parliamentary Debates*, Legislative Assembly, 24 March 2011, 874 (E Moorhead), 877 (D Scott), Queensland, *Parliamentary Debates*, Legislative Assembly, 2 August 2011, 2240 (MA O’Neill), 2285 (JA Miller), 2286 (D Farmer), 2288 (G Grace), 2289 (P Lawlor).

¹⁰⁴ *Queensland Civil and Administrative Tribunal Act 2009* (Qld) sch 2 para 14A (Conciliation) inserted by *Neighbourhood Disputes Resolution Act 2011* (Qld) ss 103–104 (Act as passed).

¹⁰⁵ *Queensland Civil and Administrative Tribunal Act 2009* (Qld) s 237(3).

¹⁰⁶ *Queensland Civil and Administrative Tribunal Act 2009* (Qld) s 218(1)(b), (d).

¹⁰⁷ Conciliation of residential tenancy disputes is conducted by the Residential Tenancies Authority under the *Residential Tenancies and Rooming Accommodation Act 2008* (Qld) ch 6 pt 1. Conciliation of discrimination complaints is conducted by the Anti-Discrimination Commission Queensland under the *Anti-Discrimination Act 1991* (Qld) ch 7 pt 1 div 3.

¹⁰⁸ Queensland Civil and Administrative Tribunal, *Practice Direction No 4 of 2011 – Arrangements for the mediation and determination of minor civil disputes*, 1 November 2011, [4], [7]. Note the exceptions of applications under ss 38 and 39 of the Act concerning unauthorised construction or demolition of a dividing fence ([3(c)]) and any minor civil dispute for an amount up to \$3000 ([3(d)]).

4.54 The mediation may be conducted by a QCAT member, adjudicator, the principal registrar of QCAT or a person external to and approved by QCAT such as a DRB mediator (the mediator).¹⁰⁹ The mediator determines the way in which the mediation will be conducted.¹¹⁰ Mediation may be conducted in person or by telephone.¹¹¹ The mediator may gather information about the nature and facts of the dispute and see parties together and separately, with and without their representatives.¹¹²

4.55 The parties may be directed to attend mediation.¹¹³ Written notice of the mediation must be given no earlier than three months before the mediation is to be held.¹¹⁴ If a party does not attend (or send an authorised representative¹¹⁵) without reasonable excuse, causing the other party disadvantage, QCAT may order that the proceeding be dismissed or struck out, make its final decision in favour of the other party or order that the absent party pay another party's costs.¹¹⁶

4.56 If the mediator is a QCAT member or adjudicator, that person must not constitute the tribunal for the proceeding (that is, must not hear and decide the matter), unless all parties agree otherwise.¹¹⁷

Compulsory conference

4.57 QCAT may refer a tree dispute (other than an overhanging branch debt dispute) to compulsory conference prior to listing the matter for hearing.¹¹⁸

4.58 Compulsory conference is a private meeting of the parties facilitated by QCAT to identify issues in dispute, to promote a settlement and, if the dispute cannot be settled, to make orders and give directions about the future conduct of the QCAT proceedings.¹¹⁹

¹⁰⁹ *Queensland Civil and Administrative Tribunal Act 2009* (Qld) s 79.

¹¹⁰ Subject to compliance with QCAT rules: *Queensland Civil and Administrative Tribunal Act 2009* (Qld) s 78(2). For example, mediators must have certain discussions with the parties: *Queensland Civil and Administrative Tribunal Rules 2009* (Qld) r 73.

¹¹¹ Queensland Civil and Administrative Tribunal, *Practice Direction No 4 of 2011 – Arrangements for the mediation and determination of minor civil disputes*, 1 November 2011, [6].

¹¹² *Queensland Civil and Administrative Tribunal Rules 2009* (Qld) r 72.

¹¹³ *Queensland Civil and Administrative Tribunal Act 2009* (Qld) s 76.

¹¹⁴ *Queensland Civil and Administrative Tribunal Act 2009* (Qld) s 75(3); *Queensland Civil and Administrative Tribunal Rules 2009* (Qld) r 70; Queensland Civil and Administrative Tribunal, *Practice Direction No 6 of 2010 – Compulsory Conferences and Mediations*, 20 April 2010, [3].

¹¹⁵ *Queensland Civil and Administrative Tribunal Act 2009* (Qld) s 76(1).

¹¹⁶ *Queensland Civil and Administrative Tribunal Act 2009* (Qld) s 48.

¹¹⁷ *Queensland Civil and Administrative Tribunal Act 2009* (Qld) s 81.

¹¹⁸ Queensland Civil and Administrative Tribunal, *Practice Direction No 7 of 2013 – Arrangements for applications for orders to resolve other issues about trees*, 3 April 2014, [11(a)].

¹¹⁹ *Queensland Civil and Administrative Tribunal Act 2009* (Qld) ss 67–70.

4.59 The QCAT Act states that certain provisions of that Act apply to a compulsory conference as if the compulsory conference were a proceeding before QCAT.¹²⁰ For example, in a compulsory conference, QCAT must:¹²¹

- observe the rules of natural justice;
- take steps to ensure that each party understands the tribunal's practices and procedures; and the actions, views and assertions made by the parties, including the nature and legal implications of such assertions; and
- ensure the conference is conducted in such a way that recognises and is responsive to cultural diversity and the needs of the parties.

4.60 The compulsory conference is presided over by a QCAT member, adjudicator or the principal registrar.¹²² The person presiding may exercise a power to:¹²³

- grant relief from procedural requirements;
- give directions for the conduct of the hearing;
- direct a party to produce documents or other information;
- order a person who is not a party to produce a document or thing; and
- order that a particular document be amended.

4.61 The person presiding may inform himself or herself in any way that he or she considers appropriate.¹²⁴ In exercising these powers, a compulsory conference is able to progress a matter towards hearing.

4.62 The parties may be directed to attend the compulsory conference.¹²⁵ Written notice of the compulsory conference must be given no earlier than three months before the conference is to be held.¹²⁶ If a party does not attend (or send an authorised representative¹²⁷), the conference may proceed regardless and the person presiding may make decisions adverse to the absent party, including orders

¹²⁰ See, eg, *Queensland Civil and Administrative Tribunal Act 2009* (Qld) ss 70(4), 72(1)(b), 72(3), 84(3). See also ss 137, 169(3), 212(3).

¹²¹ *Queensland Civil and Administrative Tribunal Act 2009* (Qld) ss 28, 29, 70(4).

¹²² *Queensland Civil and Administrative Tribunal Act 2009* (Qld) s 70(1).

¹²³ *Queensland Civil and Administrative Tribunal Act 2009* (Qld) ss 61–64, 71.

¹²⁴ *Queensland Civil and Administrative Tribunal Act 2009* (Qld) ss 28(3)(c), 70(4).

¹²⁵ *Queensland Civil and Administrative Tribunal Act 2009* (Qld) ss 67–68.

¹²⁶ *Queensland Civil and Administrative Tribunal Act 2009* (Qld) s 67(2); *Queensland Civil and Administrative Tribunal Rules 2009* (Qld) r 69; *Queensland Civil and Administrative Tribunal, Practice Direction No 6 of 2010 – Compulsory Conferences and Mediations*, 20 April 2010, [2].

¹²⁷ *Queensland Civil and Administrative Tribunal Act 2009* (Qld) s 68.

that the absent party be removed from the proceeding and pay another party's costs.¹²⁸

4.63 If the person presiding is a QCAT member or adjudicator, there is a presumption that the person will also constitute the tribunal for the proceeding, unless the person disqualifies himself or herself from constituting the tribunal for the proceeding or a party files a written objection.¹²⁹

4-6 Should there be one form of ADR process used for all disputes under the Act? If so, which process and why?

Features of minor civil disputes

4.64 The QCAT Act contains detailed provisions regarding the conduct of proceedings in the minor civil disputes jurisdiction. The distinguishing features of this jurisdiction include:

- local Magistrates Courts (except Brisbane Magistrates Court) may process and manage a minor civil dispute application through to resolution. All other applications filed in a local Magistrates Court are forwarded to QCAT's registry in Brisbane for processing and managing;¹³⁰
- a monetary limit of \$25 000 generally applies to a minor civil dispute (with some exceptions not relevant to neighbourhood disputes), otherwise no prescribed monetary limit applies;¹³¹
- a minor civil dispute may be heard and decided by a magistrate sitting as an ordinary member of QCAT,¹³² an adjudicator,¹³³ a judicial registrar sitting as an adjudicator for minor civil disputes¹³⁴ and, in some circumstances, justices of the peace.¹³⁵ Otherwise, the QCAT President must choose one,

¹²⁸ *Queensland Civil and Administrative Tribunal Act 2009* (Qld) s 72.

¹²⁹ *Queensland Civil and Administrative Tribunal Act 2009* (Qld) s 73.

¹³⁰ Department of Justice and Attorney-General (Qld), 'Review of the Queensland Civil and Administrative Tribunal Act 2009' (Consultation Paper, December 2012), 18.

¹³¹ *Queensland Civil and Administrative Tribunal Act 2009* (Qld) ss 11–13, sch 3 (definition of 'minor civil dispute'), (definition of 'prescribed amount'). The exceptions to the minor civil dispute monetary limit not relevant to this review relate to claims for repair of a motor vehicle defect, tenancy matters and certain building disputes: s 13(4), sch 3 (definition of 'minor civil dispute' para 1(d)–(e), (g)).

¹³² Every magistrate, while the magistrate holds the office of magistrate, is an ordinary member of the tribunal for minor civil disputes: *Queensland Civil and Administrative Tribunal Act 2009* (Qld) s 171(2).

¹³³ *Queensland Civil and Administrative Tribunal Act 2009* (Qld) s 195(a).

¹³⁴ *Queensland Civil and Administrative Tribunal Act 2009* (Qld) s 198A.

¹³⁵ *Queensland Civil and Administrative Tribunal Act 2009* (Qld) ch 4 pt 4B. See especially s 206L(1).

two or three members, or an adjudicator, to constitute the tribunal for a hearing;¹³⁶

- the decision on a minor civil dispute and oral reasons for the decision are delivered on the day of hearing, unless it is not appropriate to do so.¹³⁷ In other cases, the decision must be delivered within a reasonable time;¹³⁸ and
- a minor civil dispute order can be enforced through the Magistrates Court (regardless of whether the order involves the payment of money), otherwise a non-monetary order must be enforced through the Supreme Court.¹³⁹

4-7 Should there be any change to QCAT's minor civil disputes jurisdiction for matters arising under the Act?

4-8 Specifically, should QCAT's minor civil disputes jurisdiction (a) include all dividing fence and tree disputes for any amount, or (b) exclude all dividing fence and tree disputes? Why or why not?

Hearings before QCAT

4.65 If a dispute has not been resolved through ADR processes, the dispute will proceed to a hearing before QCAT. Parties are given notice of the time and place for the hearing.¹⁴⁰ If a party does not attend, QCAT may still hear and decide the dispute in the person's absence.¹⁴¹

4.66 At the hearing, parties have the opportunity to present evidence, examine witnesses and make submissions.¹⁴² QCAT may require a person to give evidence at the hearing or to produce a particular document or other thing¹⁴³ and it may call and examine witnesses.¹⁴⁴

¹³⁶ *Queensland Civil and Administrative Tribunal Act 2009* (Qld) s 165. The constitution of the Tribunal is discussed at [4.74]–[4.77] below.

¹³⁷ Queensland Civil and Administrative Tribunal, *Practice Direction No 4 of 2011 – Arrangements for the mediation and determination of minor civil disputes*, 1 November 2011, [16].

¹³⁸ Final decisions of QCAT are discussed at [4.82] below.

¹³⁹ *Queensland Civil and Administrative Tribunal Act 2009* (Qld) ss (7)(a), 131, 132(2). See also Queensland Civil and Administrative Tribunal, *Enforcing a QCAT minor civil dispute decision* (September 2012) <http://www.qcat.qld.gov.au/_data/assets/pdf_file/0020/205427/Enforcing-a-QCAT-decision.pdf>. Enforcement of QCAT orders is discussed at [4.93]–[4.102] below.

¹⁴⁰ *Queensland Civil and Administrative Tribunal Act 2009* (Qld) s 92.

¹⁴¹ *Queensland Civil and Administrative Tribunal Act 2009* (Qld) s 93.

¹⁴² *Queensland Civil and Administrative Tribunal Act 2009* (Qld) s 95.

¹⁴³ *Queensland Civil and Administrative Tribunal Act 2009* (Qld) s 97.

¹⁴⁴ *Queensland Civil and Administrative Tribunal Act 2009* (Qld) s 98.

Hybrid hearings

4.67 A proceeding may be listed for a hybrid hearing if QCAT or the principal registrar decides that it is appropriate.¹⁴⁵

4.68 In a hybrid hearing, parties attend the hearing and then attend a mediation after the hearing on the same day.¹⁴⁶ At the end of the hearing, the member reserves their decision, adjourns the matter, records their proposed decision and reasons in writing and places them in a sealed envelope.¹⁴⁷ The parties then attend mediation before the same QCAT member.¹⁴⁸

4.69 If the proceeding is settled at mediation, the member records the terms of the settlement, makes the orders necessary to give effect to the settlement and destroys the proposed decision and reasons.¹⁴⁹

4.70 If the proceeding is not settled at mediation, the member makes the decision by reading the proposed decision and reasons into the record and makes the orders necessary to give effect to the decision.¹⁵⁰

4.71 QCAT gives the parties this opportunity to mediate after the hearing because, among other reasons, during the hearing the parties will hear all of the evidence and submissions of the other parties and may have a different view about reaching an agreement afterwards.¹⁵¹

Expedited hearings

4.72 QCAT may conduct an expedited hearing for a minor civil dispute or a matter an enabling Act states is a matter for which an expedited hearing may be conducted.¹⁵² Dividing fence disputes for an amount not more than \$25 000 and overhanging branch debt disputes are minor civil disputes and therefore may have an expedited hearing.

4.73 Expedited hearings differ from standard hearings, for example:

¹⁴⁵ Queensland Civil and Administrative Tribunal, *Practice Direction No 1 of 2012 – Hybrid hearings*, 3 September 2012, [7].

¹⁴⁶ Ibid [5].

¹⁴⁷ Ibid [12]–[14].

¹⁴⁸ Ibid [8(f)], [15].

¹⁴⁹ Ibid [17].

¹⁵⁰ Ibid [18].

¹⁵¹ Ibid [6(a)].

¹⁵² *Queensland Civil and Administrative Tribunal Act 2009* (Qld) s 94.

- before the expedited hearing, generally each party must file and exchange statements of witnesses, expert reports and other documents on which the party relies;¹⁵³
- at the hearing, generally the parties must arrange for attendance of witnesses to clarify or expand on evidence in the documents filed;¹⁵⁴
- parties will not necessarily have the opportunity to cross-examine the other party's witnesses or re-examine their own witnesses;¹⁵⁵
- QCAT may limit the time for the hearing;¹⁵⁶ and
- QCAT will deliver its decision and oral reasons for the decision on the day of hearing, unless it is not appropriate to do so.¹⁵⁷

Constitution of the tribunal

4.74 The QCAT President determines the constitution of the tribunal for hearings and, in doing so, must choose one, two or three members, or an adjudicator, to constitute the tribunal for a particular matter.¹⁵⁸

4.75 In choosing the persons who are to constitute the tribunal for a particular matter, the President must consider certain matters, for example, the nature and complexity of the matter and any provision of an enabling Act that may be relevant.¹⁵⁹

¹⁵³ *Queensland Civil and Administrative Tribunal Rules 2009* (Qld) r 82(1). Cf *Queensland Civil and Administrative Tribunal Act 2009* (Qld) s 57(3): 'The tribunal may permit a person appearing as a witness before the tribunal to give evidence by tendering a written statement, verified, if the tribunal directs, by oath'; s 95(4): 'Evidence in a hearing — (a) may be given orally or in writing; and (b) if the tribunal requires, must be given on oath or by affidavit'.

¹⁵⁴ *Queensland Civil and Administrative Tribunal Rules 2009* (Qld) r 82(2)(a). Cf *Queensland Civil and Administrative Tribunal Act 2009* (Qld) s 95(1): 'The tribunal must allow a party to a proceeding a reasonable opportunity to — (a) call or give evidence'.

¹⁵⁵ *Queensland Civil and Administrative Tribunal Act 2009* (Qld) s 95(2)(c): 'for an expedited hearing under section 94, cross-examination or re-examination of witnesses is at the discretion of the tribunal, subject to the rules'. Cf s 95(1): 'The tribunal must allow a party to a proceeding a reasonable opportunity to — ... (b) examine, cross-examine and re-examine witnesses'.

¹⁵⁶ *Queensland Civil and Administrative Tribunal Rules 2009* (Qld) r 82(2)(b). See *Queensland Civil and Administrative Tribunal, Practice Direction No 1 of 2010 – Arrangements for hearing Minor Civil Disputes (Brisbane and South East Qld Circuit Centres)*, 2 March 2010, [1]: 'Matters will be listed for hearing in 2 hour sessions'. Cf *Queensland Civil and Administrative Tribunal Act 2009* (Qld) s 95(3): 'the tribunal may place time limits on the giving of evidence and on the examination, cross-examination and re-examination of witnesses' but not the hearing.

¹⁵⁷ *Queensland Civil and Administrative Tribunal, Practice Direction No 4 of 2011 – Arrangements for the mediation and determination of minor civil disputes*, 1 November 2011, [16]. Cf *Queensland Civil and Administrative Tribunal Act 2009* (Qld) s 119: 'The tribunal must give its decision in a proceeding, including its final decision, within a reasonable time'; *Queensland Civil and Administrative Tribunal, Practice Direction No 4 of 2013 – Reserved Decisions and Decisions on the Papers*, 10 May 2013: within 90 days.

¹⁵⁸ *Queensland Civil and Administrative Tribunal Act 2009* (Qld) s 165.

¹⁵⁹ *Queensland Civil and Administrative Tribunal Act 2009* (Qld) s 167(1).

4.76 If an enabling Act (such as the Act) provides that the tribunal is to be constituted for a particular matter in a particular way, the President must ensure the tribunal is constituted in that way.¹⁶⁰ The Act is silent as to the constitution of the tribunal for dividing fence and tree matters.

4.77 Minor civil disputes may be heard and decided by a magistrate sitting as an ordinary member of QCAT,¹⁶¹ an adjudicator,¹⁶² a judicial registrar sitting as an adjudicator for minor civil disputes¹⁶³ and, in some circumstances, justices of the peace.¹⁶⁴

Representation before QCAT

4.78 Generally parties represent themselves in QCAT, unless the interests of justice require otherwise.¹⁶⁵ The circumstances in which QCAT may allow a party to be represented by someone else (who may or may not be a lawyer) include:¹⁶⁶

- where the enabling Act states the person may be represented;
- where the party is a person with impaired capacity;
- where the proceeding is likely to involve complex questions of fact or law; and
- where all parties agree on representation.

4.79 These rules are consistent with QCAT's aims to be economical, informal and quick.

4.80 The Act states that in a proceeding under Chapter 2 (Dividing Fences), an adjoining owner may be represented by a real estate agent.¹⁶⁷ This is intended to provide a practical and inexpensive way for an owner (particularly an absentee owner) to be represented before QCAT.¹⁶⁸ There is no equivalent provision for real estate agents to represent neighbours in tree disputes.

¹⁶⁰ *Queensland Civil and Administrative Tribunal Act 2009* (Qld) s 167(4).

¹⁶¹ *Queensland Civil and Administrative Tribunal Act 2009* (Qld) s 171(2).

¹⁶² *Queensland Civil and Administrative Tribunal Act 2009* (Qld) s 195(a).

¹⁶³ *Queensland Civil and Administrative Tribunal Act 2009* (Qld) s 198A.

¹⁶⁴ *Queensland Civil and Administrative Tribunal Act 2009* (Qld) ch 4 pt 4B. See especially s 206L(1).

¹⁶⁵ *Queensland Civil and Administrative Tribunal Act 2009* (Qld) s 43(1).

¹⁶⁶ *Queensland Civil and Administrative Tribunal Act 2009* (Qld) s 43(2)–(7).

¹⁶⁷ *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Qld) s 34.

¹⁶⁸ See Deputy Premier and Attorney-General, Minister for Local Government and Special Minister of State, 'Neighbourhood Disputes Resolution Bill 2010: Results of Consultation Process' (November 2010) 8 at Department of Premier and Cabinet (Qld), *Cabinet documents* (6 August 2014) <<http://rti.cabinet.qld.gov.au/cabinet.aspx>>.

4-9 Should a party to a dividing fence or tree dispute be entitled to appoint an agent to represent them in proceedings before QCAT?

Costs (incurred by parties in QCAT proceedings)

4.81 Generally each party bears their own costs for the proceeding before QCAT.¹⁶⁹ However, QCAT may make orders requiring one party to pay another party's costs in certain circumstances, for example, if it considers the interests of justice require a costs order.¹⁷⁰ This aims to ensure that the QCAT jurisdiction remains a low-cost jurisdiction.¹⁷¹ Costs may be awarded at any stage of a proceeding or after the proceeding has ended.¹⁷²

Final decision by QCAT

4.82 After the hearing, QCAT must give a final decision in the proceeding within a reasonable time.¹⁷³ QCAT's decision may include an order, which is a direction or instruction for one or all parties to do something, or to stop acting in a particular way.¹⁷⁴ QCAT's decision is binding on all parties to the proceeding.¹⁷⁵

Renewal of final decision

4.83 A party may apply to QCAT for a renewal of the final decision within 28 days of being given notice of the decision or written reasons if:¹⁷⁶

- it is not possible for the tribunal's final decision in a proceeding to be complied with; or
- there are problems with interpreting, implementing or enforcing the tribunal's final decision in a proceeding.

¹⁶⁹ *Queensland Civil and Administrative Tribunal Act 2009* (Qld) s 100.

¹⁷⁰ *Queensland Civil and Administrative Tribunal Act 2009* (Qld) ss 100, 102, 105 and generally ch 2 pt 6 div 6; *Queensland Civil and Administrative Tribunal Rules 2009* (Qld) pt 9 div 2.

¹⁷¹ Queensland, *Parliamentary Debates*, Legislative Assembly, 19 May 2009, 352 (CR Dick, Attorney-General and Minister for Industrial Relations).

¹⁷² *Queensland Civil and Administrative Tribunal Act 2009* (Qld) s 106.

¹⁷³ *Queensland Civil and Administrative Tribunal Act 2009* (Qld) ss 119, 121; Queensland Civil and Administrative Tribunal, *Practice Direction No 4 of 2013 – Reserved Decisions and Decisions on the Papers*, 10 May 2013: within 90 days.

¹⁷⁴ *Queensland Civil and Administrative Tribunal Act 2009* (Qld) s 114; Queensland Civil and Administrative Tribunal, *Enforcing a QCAT decision* (22 April 2015) <<http://www.qcat.qld.gov.au/qcat-decisions/enforcing-a-qcat-decision>>.

¹⁷⁵ *Queensland Civil and Administrative Tribunal Act 2009* (Qld) s 126(1).

¹⁷⁶ *Queensland Civil and Administrative Tribunal Act 2009* (Qld) s 133; *Queensland Civil and Administrative Tribunal Rules 2009* (Qld) r 89, sch (definition of 'relevant day').

4.84 A party cannot make an application for renewal if the decision is the subject of an appeal, or an application for leave to appeal, whether or not the appeal or application has been decided.¹⁷⁷

4.85 QCAT may make the same final decision or any other appropriate final decision that it could have made when the proceeding was originally decided.¹⁷⁸ This renewed final decision cannot be renewed again.¹⁷⁹

Appeal of final decision

4.86 If a party is not satisfied with QCAT's final decision, the party may appeal against the decision to the appeal tribunal¹⁸⁰ or, in some circumstances, the Court of Appeal.¹⁸¹

NON-COMPLIANCE UNDER THE ACT

4.87 The Act contains the following provisions in relation to neighbours' compliance with QCAT decisions and orders (referred to here as 'orders').

Right to enter neighbour's land to carry out work

4.88 If a person is obliged to carry out fencing work or work relating to trees pursuant to a QCAT order, that person (or their employee or agent) may enter their neighbour's land at a reasonable time and to a reasonable extent needed to carry out the work.¹⁸² The person must give their neighbour written notice of the intention to enter the land to carry out the work at least seven days before entering the neighbour's land.¹⁸³

Penalty for failure to comply with a tree order

4.89 A person who, without reasonable excuse, fails to comply with a requirement imposed upon that person by an order under Chapter 3 (Trees) of the

¹⁷⁷ *Queensland Civil and Administrative Tribunal Act 2009* (Qld) s 133(6)–(7).

¹⁷⁸ *Queensland Civil and Administrative Tribunal Act 2009* (Qld) s 134(2).

¹⁷⁹ *Queensland Civil and Administrative Tribunal Act 2009* (Qld) s 134(4).

¹⁸⁰ *Queensland Civil and Administrative Tribunal Act 2009* (Qld) ch 2 pt 8 div 1 (eg, if a judicial member did not constitute the tribunal in the proceeding).

¹⁸¹ *Queensland Civil and Administrative Tribunal Act 2009* (Qld) ch 2 pt 8 div 2 (eg, if a judicial member constituted the tribunal in the proceeding).

¹⁸² *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Qld) s 94.

¹⁸³ *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Qld) s 94(2).

Act commits an offence.¹⁸⁴ A court may impose a maximum penalty of 1000 penalty units.¹⁸⁵

Local government assistance to carry out work on a tree

4.90 Where a tree-keeper fails to comply with a QCAT order to carry out work on a tree, the neighbour may ask the local government¹⁸⁶ to take action.¹⁸⁷

4.91 The local government is not required to take action.¹⁸⁸ However, if it does decide to take action, an appropriately qualified person authorised by the local government may enter the tree-keeper's land¹⁸⁹ to:¹⁹⁰

- inspect the tree to determine if the work has been carried out as required by the order; and/or
- carry out the work if the work has not been carried out as required by the order.

4.92 Generally the local government must give the tree-keeper at least seven days' notice of the intention to enter the land.¹⁹¹

NON-COMPLIANCE UNDER THE QCAT ACT

4.93 If a person does not comply with a QCAT order, the order may be enforced through a court.¹⁹²

4.94 A person seeking to enforce an order of QCAT must file a certified copy of the order and an affidavit in the registry of the relevant court.¹⁹³ There is no cost for

¹⁸⁴ *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Qld) s 77. Section 77 is an offence-creating provision which requires enforcement under the *Justices Act 1886* (Qld).

¹⁸⁵ The prescribed value of a penalty unit is \$113.85: *Penalties and Sentences Act 1992* (Qld) ss 5(1)(e)(i), 5A; *Penalties and Sentences Regulation 2005* (Qld) s 2B. As from 1 July 2015, the prescribed value of a penalty unit will be \$117.80: *Penalties and Sentences Amendment Regulation (No 1) 2015* (Qld) ss 2, 4.

¹⁸⁶ Not less than 7 days after the end of the period stated in QCAT's order: *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Qld) s 88(1)(c).

¹⁸⁷ *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Qld) s 88(1).

¹⁸⁸ *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Qld) s 88(2).

¹⁸⁹ An authorised person may enter the tree-keeper's land (not a dwelling on the land) only to a reasonable extent needed to carry out the work under this section: *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Qld) s 88(5B)–(5C).

¹⁹⁰ *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Qld) s 88(3).

¹⁹¹ *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Qld) s 88(4). Cf notice requirements under s 88(5)–(5A).

¹⁹² *Queensland Civil and Administrative Tribunal Act 2009* (Qld) ss 131, 132. See also Queensland Civil and Administrative Tribunal, *Enforcing a QCAT decision* (22 April 2015) <<http://www.qcat.qld.gov.au/qcat-decisions/enforcing-a-qcat-decision>>.

filing these documents.¹⁹⁴ On filing these documents, QCAT's order is taken to be an order of the court in which it is filed and may be enforced accordingly.¹⁹⁵

Monetary orders

4.95 Section 131 of the QCAT Act provides the process for enforcing monetary orders made by QCAT. The relevant court is the Magistrates Court, which has jurisdiction for claims of an amount up to \$150 000.¹⁹⁶

4.96 An enforcement warrant is used to enforce a monetary order of QCAT in a Magistrates Court.¹⁹⁷ Once the QCAT order has been filed in the Magistrates Court, the enforcement creditor¹⁹⁸ may apply to the Court for an enforcement warrant to recover the debt from the enforcement debtor.¹⁹⁹

4.97 Enforcement warrants can authorise the seizure and sale of property of the enforcement debtor,²⁰⁰ the redirection of debts payable to the enforcement debtor²⁰¹ or the redirection of their earnings.²⁰²

Non-monetary orders

4.98 Section 132 of the QCAT Act provides the process for enforcing non-monetary orders.

4.99 For the enforcement of non-monetary minor civil dispute orders, including dividing fence orders, the relevant court is the Magistrates Court.²⁰³

193 *Queensland Civil and Administrative Tribunal Act 2009* (Qld) ss 131(2), 132(2). Any copy of a QCAT order filed in a court registry must be certified by the principal registrar of QCAT as being a true copy: ss 131(2)(a), 132(2)(a). An affidavit is a sworn statement of fact, which is signed by the party seeking enforcement and witnessed by a justice of the peace, commissioner of declarations or lawyer.

194 *Queensland Civil and Administrative Tribunal Act 2009* (Qld) ss 131(3), 132(3).

195 *Queensland Civil and Administrative Tribunal Act 2009* (Qld) ss 131(4), 132(4).

196 *Magistrates Courts Act 1921* (Qld) ss 2 (definition of 'prescribed limit'), 4.

197 *Uniform Civil Procedure Rules 1999* (Qld) ch 19 (Enforcement of money orders), r 793 ('enforcement warrant' means a warrant issued under this chapter [19] to enforce a money order). See generally *Queensland Courts, Enforcement warrants: Magistrates Court – Civil* (28 March 2012) <<http://www.courts.qld.gov.au/courts/magistrates-court/money-disputes-up-to-150000/enforcement-warrants>>; Queensland Civil and Administrative Tribunal, *Enforcing a QCAT minor civil dispute decision* (September 2012) <http://www.qcat.qld.gov.au/data/assets/pdf_file/0020/205427/Enforcing-a-QCAT-decision.pdf>.

198 *Uniform Civil Procedure Rules 1999* (Qld) r 793 ('enforcement creditor' means a person entitled to enforce an order for the payment of money, or a person to whom the benefit of part of the order has passed by way of assignment or in another way).

199 *Uniform Civil Procedure Rules 1999* (Qld) rr 793 ('enforcement debtor' means a person required to pay money under an order); 817 (Procedure for applying for an enforcement warrant).

200 *Uniform Civil Procedure Rules 1999* (Qld) ch 19 pt 4.

201 *Uniform Civil Procedure Rules 1999* (Qld) ch 19 pt 5.

202 *Uniform Civil Procedure Rules 1999* (Qld) ch 19 pt 6.

203 *Queensland Civil and Administrative Tribunal Act 2009* (Qld) s 132(7)(a).

4.100 For the enforcement of other non-monetary orders, including tree orders, the relevant court is the Supreme Court.²⁰⁴ The Supreme Court may transfer the matter to a lower court²⁰⁵ if the order is of a kind that may be made by the lower court or is otherwise capable of being enforced in the lower court.²⁰⁶ If this occurs, the order is taken to be an order of the lower court and may be enforced accordingly.²⁰⁷

4.101 Non-monetary orders may be enforced by enforcement warrants,²⁰⁸ an order for substituted performance²⁰⁹ or punishment for contempt.²¹⁰

Penalty for contravening a non-monetary order

4.102 A person who, without reasonable excuse, contravenes a non-monetary order of QCAT commits an offence.²¹¹ A court may impose a maximum penalty of 100 penalty units.²¹²

- 4-10 Should the Act contain provisions about compliance and enforcement of QCAT orders regarding dividing fences and trees? If so, what provisions should apply?**
- 4-11 Should there be a simplified process for the enforcement of non-monetary orders?**

²⁰⁴ *Queensland Civil and Administrative Tribunal Act 2009* (Qld) s 132(7)(b).

²⁰⁵ A 'lower court' means a District Court or Magistrates Court: *Queensland Civil and Administrative Tribunal Act 2009* (Qld) s 132(7).

²⁰⁶ *Queensland Civil and Administrative Tribunal Act 2009* (Qld) s 132(5).

²⁰⁷ *Queensland Civil and Administrative Tribunal Act 2009* (Qld) s 132(6).

²⁰⁸ *Uniform Civil Procedure Rules 1999* (Qld) ch 20 (Enforcement of non-money orders); r 890 ('enforcement warrant' means a warrant issued under this chapter [20] to enforce a non-money order); pt 4 (Enforcement warrants for possession); pt 5 (Enforcement warrants for delivery of goods); pt 6 (Enforcement warrants for seizure and detention of property).

²⁰⁹ *Uniform Civil Procedure Rules 1999* (Qld) r 899.

²¹⁰ *Uniform Civil Procedure Rules 1999* (Qld) ch 20 pt 7. See, eg, r 898(2)(a).

²¹¹ *Queensland Civil and Administrative Tribunal Act 2009* (Qld) s 213. Section 213 is an offence-creating provision which requires enforcement under the *Justices Act 1886* (Qld).

²¹² *Queensland Civil and Administrative Tribunal Act 2009* (Qld) s 213(1). The prescribed value of a penalty unit is \$113.85: *Penalties and Sentences Act 1992* (Qld) ss 5(1)(e)(i), 5A; *Penalties and Sentences Regulation 2005* (Qld) s 2B. As from 1 July 2015, the prescribed value of a penalty unit will be \$117.80: *Penalties and Sentences Amendment Regulation (No 1) 2015* (Qld) ss 2, 4.

OTHER MATTERS

Fair, just and effective

4.103 The terms of reference require the review to consider whether the dispute resolution processes under the Act are fair, just and effective.²¹³

4.104 In proceedings before QCAT, the Tribunal is required to act fairly and according to the substantial merits of the case before it.²¹⁴ QCAT must observe the rules of natural justice.²¹⁵

4.105 QCAT must take all reasonable steps to ensure that each party (that is, each neighbour) understands QCAT's practices, procedures and decisions and the nature and legal implications of the parties' assertions.²¹⁶ QCAT must take steps to understand the actions, views and assertions made by a party, having regard to the party's age, any disability and cultural, religious and socioeconomic background.²¹⁷ QCAT must take steps to ensure proceedings are conducted in a way that recognises and is responsive to cultural diversity, Aboriginal tradition and Island custom and the needs of a party who is a child or a person with impaired capacity or a disability.²¹⁸ QCAT may achieve this by arranging for an interpreter or another person (for example, a person with appropriate cultural or social knowledge and experience) to help a party or witness.²¹⁹

4.106 A QCAT hearing must be held in public unless an enabling Act requires it to be held in private or QCAT directs that it be held in private.²²⁰ The Act does not contain any relevant provision. This allows justice to be seen to be done.

Accessibility of QCAT proceedings

4.107 Parties may file documents by email, fax, post, in person at the QCAT registry or at a Magistrates Court registry (other than Brisbane Magistrates Court)

²¹³ See paragraph 3(b) of the terms of reference. The terms of reference are set out in full in Appendix A of this Discussion Paper.

²¹⁴ *Queensland Civil and Administrative Tribunal Act 2009* (Qld) s 28(2).

²¹⁵ *Queensland Civil and Administrative Tribunal Act 2009* (Qld) s 28(3)(a).

²¹⁶ *Queensland Civil and Administrative Tribunal Act 2009* (Qld) s 29(1)(a).

²¹⁷ *Queensland Civil and Administrative Tribunal Act 2009* (Qld) s 29(1)(b).

²¹⁸ *Queensland Civil and Administrative Tribunal Act 2009* (Qld) s 29(1)(c).

²¹⁹ *Queensland Civil and Administrative Tribunal Act 2009* (Qld) s 44.

²²⁰ *Queensland Civil and Administrative Tribunal Act 2009* (Qld) s 90.

and sometimes by electronic lodgement, depending on the applicant and the type of proceeding.²²¹

4.108 Matters may be heard at QCAT's Brisbane hearing rooms or at a Magistrates Court courthouse. QCAT members travel throughout Queensland to allow parties the opportunity to attend the hearing in person.²²²

4.109 Parties are generally expected to attend proceedings in person,²²³ however participation by remote conferencing may be permitted in: directions hearings;²²⁴ mediation of minor civil disputes;²²⁵ and where a party has obtained the other party's written consent or applied and obtained a QCAT direction allowing participation by remote conferencing.²²⁶

4.110 QCAT venues provide support services such as wheelchair access and hearing loops to assist those with a hearing aid.²²⁷ QCAT can organise for an interpreter to assist parties during the hearing.²²⁸

4.111 Furthermore, all magistrates are appointed as ordinary QCAT members in the minor civil disputes jurisdiction.²²⁹ Magistrates can hear and decide minor civil disputes locally. Local Magistrates Courts (except Brisbane Magistrates Court) may process and manage minor civil dispute applications through to resolution.²³⁰ Queensland courthouses are established in 64 locations with a total of 130

221 *Queensland Civil and Administrative Tribunal Rules 2009* (Qld) rr 24–27. See also Queensland Civil and Administrative Tribunal, *Practice Direction No 2 of 2011 – Electronic filing of applications and other documents in minor debt proceedings*, 9 June 2015; Department of Justice and Attorney-General (Qld), 'Review of the Queensland Civil and Administrative Tribunal Act 2009' (Consultation Paper, December 2012), 18; Queensland Civil and Administrative Tribunal, *Making an application to QCAT* (February 2013) <http://www.qcat.qld.gov.au/data/assets/pdf_file/0003/175530/Fact-sheet-making-an-application.pdf>.

222 Department of Justice and Attorney-General (Qld), 'Review of the Queensland Civil and Administrative Tribunal Act 2009' (Consultation Paper, December 2012), 19–20; Queensland Civil and Administrative Tribunal, *FAQs* (7 January 2015) <http://www.qcat.qld.gov.au/using-qcat/faqs#Do_I_have_to_attend_the_proceedings_in_person?>.

223 Queensland Civil and Administrative Tribunal, *Attending by phone* (22 October 2014) <<http://www.qcat.qld.gov.au/going-to-the-tribunal/attending-by-phone>>.

224 Queensland Civil and Administrative Tribunal, *Practice Direction No 4 of 2010 – Proceeding by remote conferencing*, 1 April 2010, [1].

225 Queensland Civil and Administrative Tribunal, *Practice Direction No 4 of 2011 – Arrangements for the mediation and determination of minor civil disputes*, 1 November 2011, [6].

226 *Queensland Civil and Administrative Tribunal Act 2009* (Qld) s 32; Queensland Civil and Administrative Tribunal, *Practice Direction No 4 of 2010 – Proceeding by remote conferencing*, 1 April 2010, [3]–[5].

227 *Queensland Civil and Administrative Tribunal Act 2009* (Qld) s 29(1)(c)(ii); Queensland Civil and Administrative Tribunal, *Access and support* (26 September 2014) <<http://www.qcat.qld.gov.au/going-to-the-tribunal/support-at-qcat>>.

228 *Queensland Civil and Administrative Tribunal Act 2009* (Qld) s 29(2)(b) ('Ensuring proper understanding and regard'), 44 ('Use of interpreters and other persons').

229 *Queensland Civil and Administrative Tribunal Act 2009* (Qld) s 171(2).

230 All other applications filed in a local Magistrates Court are forwarded to QCAT's registry in Brisbane for processing and managing: Department of Justice and Attorney-General (Qld), 'Review of the Queensland Civil and Administrative Tribunal Act 2009' (Consultation Paper, December 2012), 18.

gazetted locations for holding courts in Queensland.²³¹ Magistrates travel to remote and regional areas to ensure all Queenslanders have access to justice.²³²

Affordability of QCAT proceedings

4.112 The filing of a QCAT application incurs a fee as outlined above in [4.42]. Parties may incur further costs during QCAT proceedings, depending on the nature and specific circumstances of the proceeding, including costs of obtaining evidence such as an expert's report, costs of legal representation (if permitted by QCAT) and costs of attending a hearing. These costs are generally not recoverable, even for the successful party. A party will be asked to pay the costs incurred by another party only in special circumstances.²³³

Timeliness of resolution

4.113 QCAT is intended to provide timely, informal and quick dispute resolution.²³⁴ To achieve this, QCAT must encourage the early and economical resolution of disputes, including through ADR processes if appropriate, and ensure proceedings are conducted in an informal way that minimises costs to parties and is as quick as is consistent with achieving justice.²³⁵ Accordingly, QCAT is not bound by the rules of evidence; it may inform itself in any way it considers appropriate and must act with as little formality and technicality and with as much speed as permitted by the requirements of the Act, the QCAT Act and rules and a proper consideration of the matters before it.²³⁶

4.114 QCAT applications generally may be made at any time,²³⁷ however there are specific disputes under the Act to which strict timeframes apply, notably:

- applications concerning contributions for fencing work must be made between one and two months after giving the notice to contribute;²³⁸
- applications concerning contributions for urgent fencing work must be made between one and two months after giving the notice to contribute;²³⁹ and

²³¹ Queensland Courts, *About Us* (23 November 2012) <<http://www.courts.qld.gov.au/about>>.

²³² Ibid.

²³³ Costs are discussed at [4.81] above.

²³⁴ *Queensland Civil and Administrative Tribunal Act 2009* (Qld) s 3(b). See also Department of Justice and Attorney-General (Qld), 'Review of the Queensland Civil and Administrative Tribunal Act 2009' (Consultation Paper, December 2012), 10.

²³⁵ *Queensland Civil and Administrative Tribunal Act 2009* (Qld) s 4(b)–(c). See also Department of Justice and Attorney-General (Qld), 'Review of the Queensland Civil and Administrative Tribunal Act 2009' (Consultation Paper December 2012), 10.

²³⁶ *Queensland Civil and Administrative Tribunal Act 2009* (Qld) s 28(3). See also Department of Justice and Attorney-General (Qld), 'Review of the Queensland Civil and Administrative Tribunal Act 2009' (Consultation Paper, December 2012), 10.

²³⁷ See generally, *Limitation of Actions Act 1974* (Qld) s 10 (Actions of contract and tort and certain other actions shall not be brought after the expiration of 6 years from the date on which the cause of action arose).

²³⁸ *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Qld) s 31(6).

- applications for a variation of an order authorising the carrying out of fencing work must be made within one month of being given a copy of the order.²⁴⁰

4.115 QCAT mediations and compulsory conferences will generally be held within three months of written notice of the mediation or compulsory conference being given to the parties.²⁴¹ Some minor civil disputes, most relevantly applications under sections 38 and 39 of the Act and any minor civil dispute for an amount up to \$3 000, will be listed for hearing without first being referred to mediation as a matter of practice.²⁴² Other minor civil disputes may be listed for hearing without first being referred to mediation on the application of a party.²⁴³

4.116 QCAT may list a proceeding for a hybrid hearing.²⁴⁴

4.117 A minor debt claim may be heard on seven days' notice to the parties.²⁴⁵ There is no stipulation of the amount of notice required to be given with respect to other QCAT hearings.²⁴⁶

4.118 QCAT may deliver its decision and oral reasons for the decision on the day of hearing if the matter is a minor civil dispute.²⁴⁷

4-12 What changes should be made to the Act's dispute resolution processes to better promote fairness, justice and effectiveness?

Remedies and penalties

4.119 The terms of reference require the review to consider the appropriateness of the remedies and penalties provided in the Act, including for non-compliance with QCAT orders.²⁴⁸

²³⁹ *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Qld) s 32(6).

²⁴⁰ *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Qld) s 37(4).

²⁴¹ Queensland Civil and Administrative Tribunal, *Practice Direction No 6 of 2010 – Compulsory Conferences and Mediations*, 20 April 2010, [2]–[3].

²⁴² Queensland Civil and Administrative Tribunal, *Practice Direction No 4 of 2011 – Arrangements for the mediation and determination of minor civil disputes*, 1 November 2011, [3]. Sections 38 and 39 of the *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Qld) concern unauthorised construction and demolition of a dividing fence.

²⁴³ Queensland Civil and Administrative Tribunal, *Practice Direction No 4 of 2011 – Arrangements for the mediation and determination of minor civil disputes*, 1 November 2011, [9].

²⁴⁴ Hybrid hearings are discussed at [4.67]–[4.71] above.

²⁴⁵ *Queensland Civil and Administrative Tribunal Rules 2009* (Qld) r 77(2).

²⁴⁶ *Queensland Civil and Administrative Tribunal Act 2009* (Qld) s 92; *Queensland Civil and Administrative Tribunal Rules 2009* (Qld) r 76.

²⁴⁷ QCAT decisions are discussed at [4.64] and [4.82] above.

²⁴⁸ See paragraph 3(e) of the terms of reference. The terms of reference are set out in full in Appendix A of this Discussion Paper.

4.120 As mentioned earlier in this Discussion Paper, the Act refers to the following remedies:

- common law remedies: exercising the modified common law right of abatement;²⁴⁹
- statutory remedies: giving notices to contribute for fencing work²⁵⁰ or remove overhanging branches;²⁵¹
- local law remedies: resolving the dispute (in relation to trees) under any relevant local law, local government scheme or local government administrative process;²⁵² and
- QCAT orders.²⁵³

4.121 The enforcement of QCAT orders (including penalties for non-compliance with QCAT orders) is outlined in [4.87] to [4.102] above.

4-13 What changes should be made to the Act to improve the appropriateness of the remedies and penalties provided in the Act, including for non-compliance with QCAT orders?

General

4-14 Are there any other matters that you wish to raise in relation to dispute resolution processes, compliance and enforcement under the Act?

²⁴⁹ *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Qld) ss 41(2)(a), 54, 56(2)(a), 60(2)(a).

²⁵⁰ *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Qld) s 30(2), ch 2 pt 4 div 2.

²⁵¹ *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Qld) s 41(2)(b), ch 3 pt 4.

²⁵² *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Qld) s 65(b).

²⁵³ See, eg, *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Qld) ss 35, 66.

Appendix A

Terms of Reference

Review of the *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011*

Background

The objects of the *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (the Act) are to:

- provide rules about each neighbour's responsibility for dividing fences and for trees so that neighbours are able to resolve issues about fences or trees without a dispute arising; and
- facilitate the resolution of any disputes about dividing fences or trees that arise between neighbours.

The Act gives jurisdiction to the Queensland Civil and Administrative Tribunal (QCAT) to hear and decide matters under the Act.

While QCAT hears and decides disputes about dividing fences and trees, the Dispute Resolution Branch (DRB) in the Department of Justice and Attorney-General (DJAG) provides free mediation services to assist neighbours to resolve disputes informally where possible. DJAG also provides online information to help citizens informally resolve fence and tree issues.

Under section 97 a review of the Act must start within three years of its commencement. The review must start by 1 November 2014. The review must consider whether the objects of the Act remain valid, whether the Act is meeting its objectives, and investigate any specific issues recommended by the Minister. Under section 97 of the Act, the Minister must, within six months after finishing the review, table a report about its outcome in the Legislative Assembly.

I, Jarrod Bleijie, Attorney-General and Minister for Justice, refer to the Queensland Law Reform Commission (the Commission) under section 10 of the *Law Reform Commission Act 1968*, the review of the Act.

Scope

The review of the Act is to consider:

1. Whether the objects of the Act remain valid;
2. Whether the Act is meeting its objects;
3. Without limiting its scope or form, the review will consider the following issues:

- a) whether the allocation of responsibilities, liabilities and rights under the Act promotes resolution by neighbours of issues relating to dividing fences and trees;
- b) whether dispute resolution processes under the Act are fair, just and effective;
- c) the simplicity and ease of use of the Act for members of the community, including clarity of the legislative provisions;
- d) whether the Act provides QCAT with sufficient powers to resolve issues;
- e) the appropriateness of the remedies and penalties provided in the Act, including for non-compliance with QCAT orders;
- f) the operation of the Act in relation to other Acts or laws;
- g) the operation and effect of section 66(3)(b)(ii) of the Act including whether it should operate retrospectively having regard to section 178 of the *Property Law Act 1974*;
- h) the operation and effect of section 57 of the Act; and
- i) whether scope of the Act should be expanded to include disputes about retaining walls built on neighbouring properties' boundaries.

Consultation

The review is to include public consultation about issues with the Act and associated solutions.

Timeframe

The Commission is to provide a report on the outcomes of the review to the Attorney-General and Minister for Justice by 1 November 2015.

Dated the 27th day of October 2014

Jarrold Bleijie
Attorney-General and Minister for Justice